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IN THE

Supreme Court of the United States

October Term, 1985

BASIN ELECTRIC POWER COOPERATIVE,
a North Dakota electric cooperative corporation,
Petitioner,

v.

MIDWEST PROCESSING COMPANY,
a North Dakota corporation,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTIONS PRESENTED

Petitioner Basin Electric Power Cooperative (hereinafter "Basin Electric" or "Petitioner") filed a single creditor involuntary bankruptcy petition against Midwest Processing Company (hereinafter "Midwest"). Midwest moved to dismiss, alleging it had 12 or more creditors, that three creditors were required to file the petition, and requesting bad faith damages against Basin Electric for filing as a single petitioner with knowledge of 12 or more creditors.

The bankruptcy judge ordered Midwest to produce a list of its creditors and permitted Basin Electric to obtain additional creditors to join the petition pursuant to § 303(c) of the Bankruptcy Reform Act of 1978, 11 U.S.C. (1982), *amended by* the Bankruptcy Amendments and Federal Judgeship Act of 1984, 11 U.S.C. (Supp. II 1984) and Bankruptcy Rule 1003(d) 11 U.S.C. (Supp. I 1983) (hereinafter "Code" and "Rule" respectively).

At trial, two additional creditors joined the petition. The bankruptcy judge upheld the petition, found Midwest bankrupt, and dismissed the bad faith claim against Basin Electric. On appeal, the District Court dismissed the bankruptcy petition for bad faith filing. The Eighth Circuit affirmed.

The questions presented are:

1. Whether Petitioner was denied a statutory right under § 303(c) of the Bankruptcy Code and Rule 1003(d) to join additional creditors after filing a single creditor bankruptcy petition by the decision of the Eighth Circuit, in conflict with a decision of this Court and the Ninth Circuit.

2. Whether a single petitioning creditor relying on its rights to join additional creditors can be found to have filed in

bad faith when it obtains additional creditors to join its petition after the debtor answers alleging it has 12 or more creditors; and

3. Whether, given the reliance of the Bankruptcy Court on Code § 303(c) and Rule 1003(d) in its preliminary determination that additional creditors would be allowed to join the petition, remand is appropriate to determine if Petitioner acted in bad faith when it filed a single creditor bankruptcy petition.

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PETITION OF BASIN ELECTRIC POWER COOPERATIVE FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Petitioner herein respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit entered in this proceeding on July 30, 1985.

OPINIONS BELOW

The Eighth Circuit Court of Appeals entered judgment and issued its Opinion on July 30, 1985. *Basin Electric Power Cooperative v. Midwest Processing Company*, 769 F.2d 483 (8th Cir. 1985) (reproduced as Appendix A). On August 26, 1985 the Eighth Circuit denied the petition for rehearing (re-

produced as Appendix B). The order and opinion of the District Court of North Dakota is reproduced as Appendix C. *Basin Electric Power Cooperative v. Midwest Processing Company*, 47 B.R. 903 (Bankr. D.N.D. 1984). The order and opinion of the Bankruptcy Court which tried the issues in this litigation is reproduced as Appendix D. *In re Midwest Processing Company*, 41 B.R. 90 (Bankr. N.D. 1984).

JURISDICTION

The jurisdiction of this Court is invoked under the authority of 28 U.S.C. § 1254(1) (1982). This action arose under 28 U.S.C. § 1334 (1982) *amended by* the Bankruptcy Amendments and Federal Judgeship Act of 1984, 28 U.S.C. § 1334 (Supp. II 1984).

STATUTES AND RULES INVOLVED

* * * * *

The Bankruptcy Reform Act of 1978,
11 U.S.C. (1982),
amended by the Bankruptcy Amendments and
Federal Judgeship Act of 1984,
11 U.S.C. (Supp. II 1984)

§ 303. Involuntary cases.

* * *

(b) An involuntary case is commenced by the filing with the bankruptcy court of a petition under chapter 7 or 11 of this title—

(1) by three or more entities, each of which is either a holder of a claim against such person that is not contingent as to liability or an indenture trustee representing such a holder, if such claims aggregate at least $5,000

more than the value of any lien on property of the debtor securing such claims held by the holders of such claims;

(2) if there are fewer than 12 such holders, excluding any employee or insider of such person and any transferee of a transfer that is voidable under Section 544, 545, 547, 548, 549, or 724(a) of this title, by one or more of such holders that hold in the aggregate at least $5,000 of such claims;

* * *

(c) After the filing of a petition under this section but before the case is dismissed or relief is ordered, a creditor holding an unsecured claim that is not contingent, other than a creditor filing under subsection (b) of this section, may join in the petition with the same effect as if such joining creditor were a petitioning creditor under subsection (b) of this section.

* * *

(f) Notwithstanding section 363 of this title, except to the extent that the court orders otherwise, and until an order for relief in the case, any business of the debtor may continue to operate, and the debtor may continue to use, acquire, or dispose of property as if an involuntary case concerning the debtor had not been commenced.

* * *

(h) If the petition is not timely controverted, the court shall order relief against the debtor in an involuntary case under the chapter under which the petition was filed. Otherwise, after trial, the court shall order relief against the debtor in an involuntary case under the chapter under which the petition was filed, only if—

(1) the debtor is generally not paying such debtor's debts as such debts become due; or

* * *

(i) If the court dismisses a petition under this section other than on consent of all petitioners and the debtor, and if the debtor does not waive the right to judgment under this subsection, the court may grant judgment—

(1) against the petitioners and in favor of the debtor for—

(A) costs;

(B) a reasonable attorney's fee; or

(C) any damages proximately caused by the taking of possession of the debtor's property by a trustee appointed under subsection (g) of this section or section 1104 of this title; or

(2) against any petitioner that filed the petition in bad faith, for—

(A) any damages proximately caused by such filing; or

(B) punitive damages.

* * * * *

§ 305. Abstention

(a) The court, after notice and a hearing, may dismiss a case under this title, or may suspend all proceedings in a case under this title at any time if—

(1) the interests of creditors and the debtor would be better served by such dismissal or suspension; or

(2)(A) there is pending a foreign proceeding; and

(B) the factors specified in section 304(c) of this title warrant such dismissal or suspension.

(b) A foreign representative may seek dismissal or suspension under subsection (a)(2) of this section.

(c) An order under subsection (a) of this section dismissing a case or suspending all proceedings in a case, or a decision not so to dismiss or suspend, is not reviewable by appeal or otherwise.

BANKRUPTCY RULE 1003
11 U.S.C. (Supp. I 1983)
INVOLUNTARY PETITION; CASE ANCILLARY TO FOREIGN PROCEEDING

* * *

(d) *Joinder of Petitioners After Filing.* If the answer to an involuntary petition filed by fewer than three creditors avers the existence of 12 or more creditors, the debtor shall file with the answer a list of all creditors with their addresses, a brief statement of the nature of their claims, and the amounts thereof. If it appears that there are 12 or more creditors as provided in § 303(b) of the Code, the Court shall afford a reasonable opportunity for other creditors to join in the petition before a hearing is held thereon.

* * * * *

ADVISORY COMMITTEE NOTE
Rule 1003

Subdivision (d). Section 303(c) of the Code permits a creditor to join in the petition at any time before the case is dismissed or relief is ordered. While this rule does not require the court to give all creditors notice of the petition, the list of creditors filed by the debtor affords a petitioner the information needed to enable him to give notice for the purpose of obtaining the co-petitioners required to make the petition sufficient. After a reasonable opportunity has been afforded other creditors to join in an involuntary petition, the hearing on the petition should be held without further delay.

STATEMENT OF THE CASE

Petitioner requests that certiorari be granted to resolve a conflict between the Eighth and Ninth circuits' interpretation of the Code and Rules governing initiation of an involuntary petition in bankruptcy by fewer than three creditors. Petitioner maintains that § 303(c) of the Code and Rule 1003(d) permit addition of creditors to an involuntary petition which has not been dismissed.

Secondly, Petitioner requests this Court to grant certiorari to construe § 303(i) of the Code which authorizes awarding damages to alleged debtors following dismissal of involuntary petitions filed against them in "bad faith."

A. Facts

Basin Electric is a non-profit wholesale electric power cooperative serving the Upper-Midwest. Midwest is a joint venture corporation whose shares are held by The Pillsbury Company (46%), A. E. Staley Manufacturing Company (46%) and Neshem-Peterson & Associates (8%). Midwest was created in 1979 to use new technology to process sunflower seeds into high protein animal feed and sunflower oil. The Midwest facility is located near Velva, North Dakota.

One of Basin Electric's generating plants, the William J. Neal Station (hereinafter the "Neal Station"), is located near Midwest's operation. In December of 1980, Midwest and Basin Electric executed resource exchange agreements whereby Basin Electric was to supply Midwest with process steam and demineralized water: Midwest, in turn, was to provide sunflower seed hulls to be burned by Basin Electric (hereinafter "Agreements"). To meet its obligations to Midwest under the Agreements, Basin Electric made substantial modifications

and improvements to its Neal Station at a cost of $5.8 million. In turn, this cost, plus interest, was to be repaid by Midwest over the 20 year period of the Agreements.

To secure Basin Electric's $5.8 million investment, both Agreements provided that security for the Basin Electric improvements would be maintained. As a condition to entering the Agreements, Basin Electric required satisfactory security for the repayment of the $5.8 million principal sum, plus interest, during the term of the Agreements. Midwest initially provided security through a $4 million deposit at a regional bank. Beginning in August, 1982, the investment was secured through a $5 million Letter of Credit at Continental Illinois National Bank & Trust Company of Chicago. The Letter of Credit was to expire August 26, 1983. Recognizing Midwest's obligation to provide security under the Agreements, Midwest renewed the Letter of Credit in April, 1983 to extend it to March 31, 1984.

Further, the parties entered into an escrow agreement whereby Midwest agreed to the conditions under which Basin Electric could draw on the Letter of Credit. If a petition in bankruptcy was filed by or against Midwest, Basin Electric could draw on the Letter of Credit. Pursuant to the Escrow Agreement, money drawn on the Letter of Credit, up to the full amount due under the Agreements, would be placed in an escrow account and released to Basin Electric if a bankruptcy petition remained undismissed for a period of 60 days.

Midwest has outstanding long-term debt in the amount of $45 million, 90% of which is guaranteed by the Farmers Home Administration (hereinafter "Loan" and "FmHA" respectively). The proceeds of the Loan were used to construct the processing facility which opened for the first time in June, 1982. Midwest was obligated, under its Loan, to make a semi-

annual interest payment in the amount of $2,765,000.00 on February 28, 1984, and to begin repayment of principal in 1985. Midwest defaulted on the $2.8 million interest payment due February 28, 1984 and has not made any payments on its $45,000,000.00 obligation since that date.

Midwest has operated at a substantial loss since it began operations in 1982. Its net earnings of $4.5 million in 1982 included gross revenues of $12 million resulting from the sale of tax benefits. Absent the sale of the tax benefits, Midwest's operating loss in 1982 was $3.7 million. In 1983 Midwest had a net loss of $7.7 million and, during the first seven months of fiscal year 1984, Midwest had a net operating loss of $7 million. *In Re Midwest Processing*, App. D at 3-4.

Midwest shut down its processing facility, its only business operation, in the spring of 1983. It told Basin Electric at that time that the design in the dehulling process was defective and the shutdown was necessary to make major modifications in the processing facility. After reopening in October, 1983, Midwest shut down its plant a second time on February 16, 1984. In February and March, 1984, Midwest laid off 52 employees leaving a skeleton staff of 17 maintenance and office employees. Midwest has never re-opened its facility and has announced no plans to do so.

Responding to the shutdown and layoffs, Basin Electric wrote to the President of Midwest on February 23, 1984 requesting Midwest to insure that a Letter of Credit in the amount of $5,000,000.00 would be maintained after March 31, 1984. The Letter of Credit secured payments due Basin Electric from Midwest under agreements whereby Basin Electric supplied steam and water to the Midwest facility. (Discussions concerning the Letter of Credit had begun in September, 1983.) Despite the letter of February 23rd, Midwest did not

assure Basin Electric that the Letter of Credit would be maintained as security. On February 28, 1984 Basin Electric gave Midwest written notice that it was in default under the Agreements by failing to provide adequate assurance of security. Basin Electric had consistently maintained that both Agreements provided that security for the payments due under each Agreement would be maintained at all times. *Id.* at App. D-9, D-10.

The parties met March 20, 1984 to resolve their differences at the offices of Basin Electric. The meeting was held to discuss Midwest's severe and obvious financial difficulties, in view of its plant shutdown, employee lay-offs, missed interest payment and failure to provide Basin Electric with assurance that adequate security would be maintained after March 31, 1984. Midwest acknowledged it had missed the $2.8 million interest payment on its long-term debt due February 28th. Although Basin Electric was already providing its services at cost, Midwest demanded that Basin Electric reduce its steam and water charges by 25%. Trial Exhibit 47. The differences were not resolved.

Following the meeting on the 20th, on March 23, 1984 Basin Electric again expressed its concern that it had not received any assurance that the Letter of Credit would not be extended. In a telephone conversation that the President of Midwest initiated, he stated that Midwest did not intend to renew the Letter of Credit and would not provide any alternate security. March 29, 1984 Basin Electric gave the President of Midwest written notice that it was terminating the parties' agreement because the default identified in the February 28th notice had not been cured within the 30 day period allowed by the Agreements. Basin Electric demanded the $5.3 million outstanding principal and interest owed by Midwest under the Agree-

ments. The same day Basin Electric filed an Involuntary Petition in Bankruptcy against Midwest. *Id.* App. D at D-10.

Following the meeting with Midwest March 20, 1984, Basin Electric investigated the possibility of filing an involuntary petition in bankruptcy against Midwest. As the notes of the March 20th meeting indicate, based on Midwest's statement that 16 banks held portions of the $45 million long-term debt, Basin Electric then assumed that three creditors were necessary to file a Petition against Midwest. The notes of the meeting also reflect that Basin Electric staff would conduct additional legal research and that it would seek to determine the loan arrangements with the 16 banks. Trial Exhibit 47.

At trial, the Senior Vice President of the First American Bank & Trust Company conceded that it and one other bank were the holders of Promissory Notes executed under the long-term debt. He stated that one bank holds the FmHA guaranteed portion, while First American Bank & Trust Company holds the unguaranteed portion of the debt. Trial Record at 371-374.

At the March 20th meeting, Basin Electric had also asked the President of Midwest about its obligations to other creditors. The President of Midwest stated that it had paid off or was current with all but one of its trade creditors. Hearing at 8, Trial Record at 381. On March 27, 1984 Midwest contacted the manager of Verendrye Electric Cooperative and the plant Superintendent of the Neal Station, both of whom live in Velva, North Dakota near the Midwest plant. They both were asked whether they knew of any unpaid creditors of Midwest: each answered no. Petitioner's Answers to Debtor's Interrogatory No. 1.

On March 29, 1984 Basin Electric filed a single creditor petition. Basin Electric did not allege that there were fewer than

12 creditors because such allegation is not required and because Basin Electric could not verify the absence of creditors beyond its investigation. In its Petition, Basin Electric did indicate its good faith belief that there had been a default on *a* long-term debt. Basin Electric therefore filed in accordance with Code § 303(b) relying on Code § 303(c) and Bkrcy. Rule 1003(d) to permit amendment of the petition if Midwest answered that it had 12 or more creditors.

Basin Electric filed against Midwest because Midwest could not pay its obligations as they came due, Midwest belonged in bankruptcy. At trial, Midwest was adjudicated bankrupt.

B. Decisions Below

Shortly after Basin Electric filed the petition for involuntary bankruptcy, Midwest moved to dismiss the petition, alleging that it had more than twelve creditors and therefore that three creditors must join the petition. The Bankruptcy Court, in a preliminary hearing, provisionally denied the motion, citing case authority, Code § 303(c) and Rule 1003(d). Hearing at 20, 24-25. The Bankruptcy Court indicated it would reconsider the motion to dismiss if a sufficient number of creditors did not join the petition within 20 days. Hearing at 19-20.

At trial, the bankruptcy judge found the debtor was bankrupt, was "generally not paying [its] debts as such debts become due," and denied Midwest's § 305 abstention motion. The Bankruptcy Court found that the bankrupt's prospect for an out of court reorganization could not be realized.

The Bankruptcy Court denied Midwest's claim that the petition for involuntary relief was filed in bad faith because it was not initially supported by three creditors. Without discussing whether Midwest owed its long term obligation to one

"holder" or 16, the bankruptcy judge inferred from the memorandum of March 20 (Trial Exhibit 47) that Basin Electric had filed its single creditor petition knowing that the debtor had 12 or more creditors because it was aware of 16 banks participating in the note. *Id.* App. D at D-25. The Bankruptcy Court initially referred to Code § 303(c) and case law to the effect that the bankruptcy court retains jurisdiction where less than the required number of creditors have filed. At trial, the Bankruptcy Court held that failure to file the initial petition with three creditors was not in bad faith. Adopting an objective bad faith test, the Bankruptcy Court found that a reasonable person would have commenced bankruptcy proceedings.

Without disturbing the findings of the Bankruptcy Court that the debtor was unable to pay its debts when due, the District Court, on appeal, dismissed the petition on the ground that it did not initially contain three creditors when Basin Electric knew of 12 or more creditors. The District Court, reviewing the same facts as the Bankruptcy Court, found that Basin Electric had acted in bad faith because it filed a single creditor petition and because under a subjective test of bad faith the motivation prompting the filing of the petition was to draw on a letter of credit.

Rejecting the Bankruptcy Court's objective test for bad faith, the District Court maintained that the Bankruptcy Court should have looked into Basin's subjective motivations together with its conduct in reaching a determination on the question of bad faith. On appeal, the Eighth Circuit affirmed the decision of the District Court.

REASONS FOR GRANTING WRIT OF CERTIORARI

A. THE DECISION BELOW CONFLICTS WITH A DECISION OF THIS COURT AND ANOTHER COURT OF APPEALS AUTHORIZING A SINGLE CREDITOR TO JOIN ADDITIONAL CREDITORS TO ITS PETITION UNDER § 303(c).

Petitioner requests this Court to grant a writ of certiorari for the following reasons. The decision of the Eighth Circuit Court of Appeals in this case conflicts with a recent Ninth Circuit decision which interprets the new Bankruptcy Code to allow precisely what Basin Electric did in this action. The Eighth Circuit decision also conflicts with a prior ruling of this Court in *Canute Steamship Co. v. Pittsburgh Coal Co.*, 263 U.S. 244 (1923), in which this Court permitted additional creditors to join a three creditor petition after the debtor challenged one of the initial creditors as ineligible to file. Furthermore, the Eighth Circuit decision effectively repeals Code § 303(c) which allows joinder of additional creditors to meet the three creditor requirement. Lastly, the Eighth Circuit decision inhibits the efficient administration of involuntary bankruptcy proceedings and conflicts with the practice and procedure in bankruptcy proceedings.

The District Court and the Court of Appeals held that the Bankruptcy Court should have dismissed Basin Electric's single creditor petition for failing to join the three creditors initially. In its petition, Basin Electric did not allege either that Midwest had 12 or more creditors or that Midwest had less than 12 creditors. Basin Electric filed its single creditor petition in reliance on the facts it knew and the law whereby

a petitioning creditor may join additional creditors if the debtor alleges it has 12 or more creditors.

Function and Interplay of § 303(c) and Rule 1003(d).

Code § 303(c) provides that after the filing of a petition for involuntary bankruptcy, but before dismissal, a creditor may join the petition with the same effect as if it filed initially.

> (c) After the filing of a petition under this section but before the case is dismissed or relief is ordered, a creditor holding an unsecured claim that is not contingent, other than a creditor filing under subsection (b) of this section, may join in the petition with the same effect as if such joining creditor were a petitioning creditor under subsection (b) of this section. 11 U.S.C. § 303 (c) (1982).

Section 303(c) works in tandem with Bankruptcy Rule 1003 (d), which provides that if, in its answer to an involuntary bankruptcy petition, the debtor alleges it has more than 12 creditors, then the debtor shall file a list of its creditors and the court shall afford a reasonable opportunity for other creditors to join as if they were initial petitioners. Bkrtcy. Rule 1003 and its Advisory Committee Note. Bkrtcy. Rule 1003(d) specifically provides for:

> (d) Joinder of petitioners after filing. If the answer to an involuntary petition filed by fewer than three creditors avers the existence of 12 or more creditors, the debtor shall file with the answer a list of all creditors with the addresses, a brief statement of the nature of their claims, and the amounts thereof. If it appears that there are 12 or more creditors as provided in Section 303 (b) of the Code, the court shall afford a reasonable op-

portunity for other creditors to join in the petition before a hearing is held thereon. Bkrcy. Rule 1003(d), 11 U.S.C. (Supp. I 1983).

Both § 303(c) and Rule 1003(d) were designed to achieve the very results ordered by the Bankruptcy Court in this case: to permit additional creditors to join Basin Electric's single creditor petition prior to a hearing.

Conflict With the Ninth Circuit

The Eighth Circuit's decision in this case is in direct conflict with a recent Ninth Circuit Court of Appeals decision which the Bankruptcy Court cited in permitting Basin Electric to seek additional creditors. *In Re Mason*, 709 F.2d 1313 (9th Cir. 1983). In *Mason*, the involuntary petition was filed by two creditors, and did not contain an allegation that the debtor had fewer than 12 creditors. *In Re Mason*, 20 B.R. 650 (Bankr. App. 9th Cir. 1982). After an Order for Relief was granted, the debtor moved to vacate it, claiming the Bankruptcy Court lacked jurisdiction, since only two creditors filed and it had more than 12 creditors. The Ninth Circuit Court of Appeals held that a petition by two creditors could not be dismissed unless the debtor could show a third creditor would not join. "The lack of three petitioning creditors would avail Mason [the debtor] only if he could show a third creditor would not join in the petition." *In Re Mason*, 709 F.2d at 1319.

Only upon such proof would a debtor show its right to remain operational, but if three creditors ultimately join the petition the original single petitioner can meet the statutory standard and the debtor, unable to meet its debt, ought to be in bankruptcy.

As authority, the Ninth Circuit relied on this Court's decision in *Canute Steamship, supra. See also, Collier on Bank-*

ruptcy, ¶ 303.08 (discussing *In re Mason*, *Op. Cit.* as standing for the proposition that the lack of the requisite number of petitioning creditors does not deprive the Bankruptcy Court of subject matter jurisdiction and, further, the involuntary debtor may not assert that the petition lacks three petitioning creditors without also demonstrating a third would not join the petitioner). In this case, pursuant to the Order of the Bankruptcy Court, Basin Electric found additional creditors to join the petition after the debtor raised the defense of a failure to join three creditors by averring that it had more than twelve creditors. Basin Electric did not request a shift in the burden of proof; it met the burden by obtaining other creditors to join the petition from the list the debtor provided; it met its statutory burden as required by case law and *In re Mason* decision.

Conflict With *Canute Steamship Co.*

The Eighth Circuit decision not only is in conflict with the Ninth Circuit, but is in conflict with this Court's earlier decision. *Canute Steamship Co. v. Pittsburgh Coal Co.*, 263 U.S. 244 (1923). In *Canute*, three creditors filed an involuntary petition against the debtor, claiming each was a creditor having a provable claim. The debtor answered denying that one of the petitioners was its creditor and that it had a provable claim. Creditors opposing the involuntary petition argued that the joinder in the petition of additional creditors did not cure an alleged defect in one of the initial creditor's claims and therefore the Court did not have jurisdiction. This Court held that the plain language of § 59f of the Bankruptcy Act of 1898, the predecessor of Code § 303(c), permitted creditors other than the original petitioners to enter their appearance and join in the petition at any time. The case recognized that the petition, if challenged, must have three creditors holding prov-

able claims. *Id.* at 248.[1] *Canute* thus holds that the defense of an insufficient number of petitioning creditors is a waivable defense, not jurisdictional, because the maintenance of the petition by three qua...ied petitioners is required only if challenged. This Court concluded that the only limitation was that the petition could not be joined after it had been dismissed and that joinder must be had before an adjudication was made.

Lastly, this Court held that intervention by other creditors is not an amendment to the original petition but is a "joining in" of the original petition itself.

> And other creditors thus joining in the original petition necessarily acquire the status of petitioning creditors as of the date on which the original petition was filed, and may thereafter avail themselves of its allegations, including those relating to the commission of the act of bankruptcy, as fully as if they had been original petitioners. *Id.* at 249.

The effect of joinder is as stated in *Canute Steamship, id.* Thus the two additional creditors obtained by Basin Electric are to be considered as original petitioning creditors, and Basin Electric met the three creditor requirement after the debtor alleged it had 12 or more creditors and raised the three creditor requirement.[2]

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[1] § 59f of the Bankruptcy Act of 1898, 11 U.S.C. § 95(f) provided that "Creditors other than the original petitioners may at any time enter their appearance and join in the petition."

[2] This Court also noted that the question upon which the decisions showed a conflict was whether the joinder of intervening creditors was permitted in an "original petition insufficient upon its face," and this Court left that question for another day. *Id.* at 250. In this case, the Bankruptcy Court held that Basin Electric was not required to allege the number of Midwest's creditors. *See* Bank-

Conflict With Practice and Procedure in Bankruptcy Proceedings.

A leading bankruptcy commentator describes the procedure adopted by the Bankruptcy Court permitting what was done in this case. In discussing the right to join additional creditors after the debtor alleges it has more than 12 creditors under § 303(c), *Collier on Bankruptcy* states:

> If the debtor files an answer or motion seeking dismissal because it has twelve or more creditors *thereby* requiring three or more petitioning creditors, *or* that certain petitioning creditors are ineligible to file [such as in *Canute supra*], the *petitioning creditors have a right to solicit additional creditors.* The task is made easier for creditors by the requirement that the debtor file with the answer or motion a list of its creditors and their addresses if the number of petitioning creditors is being attacked. *Collier on Bankruptcy.* ¶ 303.33 pp. 303-102, 103 (15th *ed.* 1985). (Emphasis and comments added, footnotes omitted.)[3]

In a footnote to this paragraph, *Collier's* cites *Matter of Trans-High Corp.*, 3 B.R. 1 (Bankr. S.D.N.Y. 1980), a recent Code decision distinguishing earlier Bankruptcy Act decisions,

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ruptcy Form 11, 11 U.S.C. (Supp. I 1983) which does not require an allegation that the debtor has more or less than 12 creditors. If Midwest contends that the petition was deficient on its face, Basin Electric requests that this Court grant certiorari on the question left open for future consideration in *Canute*, that is, whether joinder may be had in an original petition insufficient upon its face.

[3] *Collier* in the next paragraph indicates a conflict with this interpretation of the Code. *Collier's* states: "An argument can be made that, despite Section 303(c), if a petition was filed by fewer than three creditors at a time when petitioning creditors knew that three creditors were required, then the petition should be dismissed since the court never had jurisdiction over the debtor." *Id.* at pp. 303-103.

beginning with *Navison Shoe Co. v. Lane Shoe Co.*, 36 F.2d 454 (1st Cir. 1929). *Navison* held that Bankruptcy Courts never had jurisdiction of the petition if the petitioner knew that three creditors were required. Both *Trans-High* and the Bankruptcy Court in this case distinguished *Navison* because the additional creditors intervened in a timely manner in both cases. *Trans-High* at 4; *In re Midwest* at D-24. None of the *Navison* cases involved the Bankruptcy Court finding the debtor was bankrupt. Moreover, as the Bankruptcy Court in this case stated:

> The cases which evolved from the *Navison* decision all were decided under the prior Bankruptcy Act. The procedures utilized and the proof required for involuntary relief under the current Bankruptcy Code have been substantially changed from those proofs and procedures utilized under the prior Bankruptcy Act. Section 303(c) of the Bankruptcy Code envisions that additional creditors may join in the petition after an involuntary bankruptcy proceeding is commenced with the same effect as if those intervening creditors had become involved in the petition at the outset of the proceedings. The bankruptcy court retains jurisdiction over an involuntary proceeding even where the action is commenced with an insufficient number of petitioners. *In re Earl's Tire Service, Inc.*, 6 B.R. 1019 (D.Del. 1980). *See also In re Mason*, 709 F.2d 1313 (9th Cir. 1983). *In re Midwest* at 102.

Conflict With the Policies of the Code.

The policies of the Bankruptcy Code are also well served by permitting a single petitioner, even one with knowledge of additional creditors, to file the petition for reorganization under Chapter 11 and, using Rule 1003(d), to obtain the

names of additional creditors to join the petition and address the merits. The Bankruptcy Court in this case took the pragmatic position that a creditor need not sit on its hands while the debtor materially changes its position by shutting down its operations and thereby threatens the creditor's security. Whether the petitioning creditor knows the debtor has more or less than twelve creditors is irrelevant. Rule 1003(d) provides the procedure, *if the debtor* alleges it has 12 or more creditors and raises the defense, for the single petitioner to obtain additional creditors within the time set by the court. Section 303(c) permits this joinder.

In the event a single petition is filed, and the petitioner does not obtain additional creditors within the reasonable time, then the petitioner is exposed to penalties for bad faith under Code § 303(i). In practice, the petitioner's conviction that it will be able to obtain additional creditors, and the willingness to assume exposure for the failure to do so, clearly tempers any potential abuse. Yet, after the Eighth Circuit's decision, the debtor can challenge any single creditor proceeding by raising the claim of bad faith and pursuing the state of mind of the creditor as to its knowledge of the existence of the number of other creditors of the debtor. The possibility of raising the defense of bad faith on the basis of knowledge of additional creditors will also deter additional creditors from joining the petition.

Either this Court's earlier decision in *Canute*, and cases following it such as the Ninth Circuit's decision, *In Re Mason*, have been reversed, or Code § 303(c) has been repealed, or both, by the decision of the Eighth Circuit Court of Appeals. Basin Electric requests this Court grant certiorari and reverse the decision of the Eighth Circuit, thereby confirming the practice developed under *Canute, op. cit.*, recognized by

a decision of the Ninth Circuit; all this to assure effective implementation of the newly enacted Code.

B. THIS COURT MUST DEFINE A "BAD FAITH" FILING OF AN INVOLUNTARY BANKRUPTCY PETITION UNDER SECTION 303(i) OF THE BANKRUPTCY CODE.

To date, this Court has not addressed the issue of what does constitute a bad faith filing of an involuntary bankruptcy petition. Basin Electric requests the Court to address this issue for three reasons. This case will enable the Court to define "bad faith," a newly incorporated provision in the Bankruptcy Code. *In re Advance Press & Litho, Inc.*, 46 B.R. 700 (Bankr. Colo. 1984).

The bad faith standard adopted must work in parallel with the bankruptcy statute and its underlying public policy. Petitioning creditors risk damages for bad faith filings under § 303(i), and have a special need for clear decisional law to predict when a filing will be deemed "bad faith." Because different standards of bad faith may cause different results, this question of law ought to be resolved; creditors will otherwise be unable to exercise their rights to petition for involuntary bankruptcy.

Three creditors are not necessary for the initial filing so long as the creditors join after the debtor alleges it has 12 creditors. It should follow that a single creditor filing and the initial absence of three creditors cannot constitute bad faith. Even if this Court were to determine that the statute and bankruptcy rules do not permit a single creditor petition in the circumstances of this case, the statutory complexity and the lack of decisional law should not boomerang into such a

severe finding of bad faith against Basin Electric. Since Basin Electric's statutory interpretation is reasonable and sanctioned by secondary authorities in the field, its filing cannot constitute bad faith. *See* Code § 303(c), Bkrcy. Rule 1003(d) and its Advisory Committee Note, *Canute Steamship, supra*, *In re Mason, supra*, and *Colliers*, ¶ 303.33, *supra*.

1. Only An Objective Bad Faith Standard Will Protect The Rights of Debtors And Creditors Under § 303.

In addition to its misinterpretation of the Bankruptcy Code's filing requirements, the Eighth Circuit erred in adopting a subjective standard for bad faith. Existence of bad faith is a question of fact to be decided by an objective standard of what a reasonable creditor would do. *In re Grecian Heights*, 27 B.R. 172, 173 (Bankr. D.Or. 1982). The subjective standard adopted by the District Court and upheld on appeal is prejudicial to the rights of creditors and to the delicate balance of competing interests accorded within the petitioning requirements for involuntary bankruptcy under § 303(b). Unless this Court grants certiorari, the anomalous result of the rule in this case will become commonplace: meritorious petitions will be dismissed and entities adjudicated bankrupt will be free to run their businesses and injure creditors without regard to the involuntary bankruptcy statute.

Under an objective standard applied to bankruptcy filing, a petitioning creditor is in bad faith only if a reasonable person with the knowledge available to the creditor would not file against the debtor. *Grecian Heights, supra*, 27 B.R. at 173. Whether a party acted in bad faith is essentially a question of fact. *Camelot, Inc. v. Hayden*, 30 B.R. 409, 411 (D.E.D. Tenn. 1983). The parameters of the bad faith inquiry are the creditor's knowledge of the debtor's financial position and what a reasonable person with that knowledge would do.

Basically, the objective standard is a preliminary determination of the merits of the creditor's petition. Thus, petitioning creditors have been penalized for bad faith when they were actual debtors, and not creditors, of the alleged debtor, *Camelot, Inc., supra*, at 409; when the creditor had a disputed claim and had no other evidence that the debtor was failing to pay its debts, *In re Godroy Wholesale Co., Inc.*, 37 B.R. 496 (Bankr. D. Mass. 1984); and when the creditor's claim was for less than the $5,000 statutory minimum, *Matter of Ramsden*, 17 B.R. 59 (Bankr. N.D.Ga. 1981). In each of these cases, the petition was obviously groundless and could not be remedied under the Code, and the creditor filed despite awareness of the objective facts that the alleged debtor did not belong in bankruptcy.

Unlike the petitioner in those situations, Basin Electric had extensive evidence of the debtor's poor financial situation. The debtor had defaulted on the $2.8 million interest payment due on its $45 million Loan, had closed down its plant and laid off its workforce, had defaulted and failed to cure its default under its Agreements with Basin Electric. Knowing these facts, a reasonable creditor would have decided to file against the debtor. Even knowledge of 12 creditors, on the facts of this case, did not rise to the level of bad faith. *In re Midwest* at App. D, D-20-25. The Bankruptcy Court granted the petition for involuntary bankruptcy and ruled the debtor bankrupt.

The District Court held that knowledge alone constituted bad faith, substituted a subjective bad faith standard and, leaning heavily on Basin Electric's desire to draw on a letter of credit, dismissed the Petition as being filed in bad faith. The District Court's substitution of the subjective standard shifted the focus from the apparent merits of the petition (the reasonable basis for filing against a debtor) to the petitioner's purpose in filing. When Basin Electric decided to file,

it like every other creditor petitioning against a debtor, believed that filing would improve its position *vis a vis* the debtor. Basin Electric was unable to change the contractual relationship between the parties; yet the form of this contractual relationship made it vulnerable to the subjective standard adopted by the appellate court.

The subjective standard causes different outcomes for the same debtor, depending on whether the petitioning creditor has a letter of credit, some temporary security, permanent security which a debtor wrongfully fails to renew, or some other reason for filing sooner than other creditors. In this instance, the letter of credit was wholly collateral to the issue of whether the debtor was paying its debts as they came due. Moreover, the subjective standard complicates and prolongs the procedural phase of involuntary bankruptcy, thereby delaying the court from reaching the merits of the petition. Until an order for relief is entered, a debtor against which an involuntary petition has been filed is permitted to operate its business and deal with its assets as if no filing had been made. 11 U.S.C. § 303(f) (1982). Thus, any delay in reaching the merits prolongs the debtor's control of the entity to the prejudice of creditors. *In re All Media Properties, Inc.*, 5 B.R. 126, 134 (Bankr. S.D. Tex. 1980).

Finally, the subjective standard will deter creditors from filing or joining meritorious involuntary petitions. The subjective standard, because it will dismiss petitions without regard to merit, increases the risk that claimants will be liable under § 303(i). Because the standard discourages meritorious filings, it upsets the balancing of debtor and creditor interest which is the heart of § 303(b). Under § 303(b) debtors are protected from creditor harassment by the counting rules and the $5,000 threshold of the petitioner's unsecured

claims. Creditors are also protected by § 303(b) because the objective standard of bad faith and the counting rules restrict collusion between debtors and friendly creditors which could defeat meritorious petitions. The danger of the subjective standard is that a debtor will make friendly agreements with most of its creditors and "hamstring" one or two large creditors. *In re Gibraltor Amusements, Ltd.*, 291 F.2d 22, 25 (2nd Cir. 1961) (Friendly, J., dissenting).

Because of its disastrous impact on creditor's § 303 rights, certiorari should be granted and the decision of the Eighth Circuit should be reversed.

2. Remand is Appropriate for Basin Electric to Prove Its Single Creditor Petition Was Proper and Not in Bad Faith.

Basin Electric filed an involuntary bankruptcy petition as a single creditor against Midwest. The filing was done after an initial investigation of the credit status of Midwest; Basin Electric found out that the 16 banks holding the major security against Midwest were holders of a joint claim and only one bank, American Bank & Trust Company was the sole creditor on the unguaranteed portion of the major debt.

Midwest challenged the single filing. This was met by Petitioner by adding the necessary two creditors. Before the Bankruptcy Court, this was deemed a cure for the filing of a single creditor petition.

Because the Bankruptcy Judge permitted the addition of two creditors the parties did not try a number of issues which would have established that a single creditor petition was proper were not litigated. For example, the number of countable claimants under § 303(b)(2) was not litigated or determined. Hearing at 20. Petitioner was denied its opportunity to

defend its decision to file alone under § 303(b)(2). If the bankruptcy judge was incorrect in its early determination as to the filing requirements, the proper remedy is reversal of the preliminary ruling permitting the addition of other creditors and remand to determine whether the creditor's initial single filing complied with § 303(b)(2).

Upon remand Basin Electric can prove the good faith of its single filing without allegation of the numbers of claimants. While Basin Electric was aware of the existence of the 16 participating banks, which the District Court used as the sole basis for its finding that Basin Electric knew the debtor had 12 creditors, Basin Electric believed only one bank held an unguaranteed claim against Midwest. In making its prefiling investigation Basin Electric learned that only one bank was the payee on the unsecured portion of the debtor's note. Hearing at 10, Trial Record at 373.

Case law supports the reliance of Basin Electric on this conclusion. *In re McMeekin and Shoreman*, 16 B.R. 805 (Bankr. D. Mass. 1982), addressed the issue of whether two individuals holding a joint claim counted as one or two "holders" under § 303(b)(2). The court held that the individuals were two entities holding only one claim and therefore counted as only one holder. *Id.* at 808.

Because only one, rather than 16 entities was listed as payee on the unguaranteed portion of the note, Basin Electric has an even stronger argument than the *McMeekin* analysis that the bank entities can only be counted as one "holder." Basin Electric was also prepared to dispute the inclusion in the 12 creditors of small and recurring claim holders, *de minimus* claim holders and all claim holders with voidable transfers under §§ 544-45, 547-49, and 724(a) of the Code. 11 U.S.C. § 303(b)(2) (1982).

Whether or not the banks shared one claim, Basin Electric is entitled to rely on the results of its pre-petition investigation. *In re Crown Sportswear, Inc.*, 575 F.2d 991 (1st Cir. 1978). In *Crown Sportswear* the petitioner alleged less than 12 creditors and filed alone. The petitioner's filing and allegation was not in bad faith, merely because it was incorrect. The court held that the petitioner was entitled to rely on the results of its "cursory" investigation. *Crown Sportswear* at 993. Basin Electric is similarly in good faith because it filed in reliance on its investigation showing Midwest had less than 12 holders.

In the instant case, Basin Electric believed that those creditors it knew of were less than 12 holders; that it therefore could validly file under § 303(b)(2). Trial Record at 383. Basin Electric also had the benefit of the assertion of the President of Midwest who stated Midwest was current with its trade creditors. At the time of filing Basin Electric thought the debtor possibly could have 12 or more holder creditors, but its investigation had, in fact, revealed fewer than 12. Basin Electric's silence as to the number of creditors was an attempt to avoid the risk of a false allegation. These counting issues were never litigated because Midwest responded with a list of additional creditors, and because the Bankruptcy Judge ruled that Basin Electric could solicit additional creditors from this list. Therefore, remand is appropriate on these issues.

CONCLUSION

This Court has not discussed for some time its interpretation of the rights of intervening creditors to join a single creditor petition after the debtor raises the jurisdictional defense by alleging it has more than 12 creditors nor has this Court stated the standard for "bad faith" newly enacted in the Code. This Court should grant certiorari given the conflicts among the circuits, and the need for clarity in the standard for determining rights of intervention of additional creditors and bad faith under the Code.

Respectfully submitted,

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STATEMENT REQUIRED BY RULE 28.1

Basin Electric Power Cooperative has no parent corporation and no subsidiaries or affiliates other than a wholly owned subsidiary.

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 85-1063ND

BASIN ELECTRIC POWER COOPERATIVE, DAKOTA FIRE AND SAFETY EQUIPMENT COMPANY, INC., and PUMP SYSTEMS, INC.,
Petitioners-Appellants,

v.

MIDWEST PROCESSING COMPANY,
Involuntary Debtor-Appellee.

Submitted: June 10, 1985
Filed: July 30, 1985

APPEAL from the United States District Court for the District of North Dakota.

Before LAY, Chief Judge, PHILLIPS,* Senior Circuit Judge, and JOHN R. GIBSON, Circuit Judge.

PHILLIPS, Senior Circuit Judge. This case involves the filing requirements for involuntary petitions in bankruptcy. Appellant Basin Electric Power Cooperative filed an involuntary petition for reorganization under Chapter 11 of the Bankruptcy Code against appellee Midwest Processing Company. Although Midwest Processing had twelve or more creditors, no other creditors joined in the petition as required

* The HONORABLE HARRY PHILLIPS, Senior Circuit Judge, United States Court of Appeals for the Sixth Circuit, sitting by designation.

by 11 U.S.C. § 303(b)(1).[1] Midwest Processing moved to dismiss the petition for lack of the requisite number of petitioning creditors, supporting the motion with a list of over 100 of its creditors. The bankruptcy court denied the motion without prejudice and authorized Basin Electric to notify other creditors of the petition. On April 30, 1984, Dakota Fire and Safety Equipment Company, Inc. moved to join the petition. On May 4, 1984, Pump Systems, Inc. also moved to join the petition. At a hearing before the bankruptcy court on May 4 and 5, 1984, Midwest Processing Company reasserted its motion to dismiss, contending that the petition and motions to intervene were filed in bad faith. The bankruptcy court denied the motion and ordered relief on May 24, 1984.

On appeal to the district court, the district court reversed the bankruptcy court order in a memorandum opinion entered December 17, 1984. The court relied on the finding of the bankruptcy judge that Basin Electric knew Midwest Processing had twelve or more creditors when it filed the involuntary petition in bankruptcy. The district court held that the petition was filed in bad faith. It held that where "a single creditor commences an involuntary case despite knowledge that the debtor has twelve or more creditors, the petition is deficient and should be dismissed absent special circumstances." The court also held that Basin Electric filed the petition in bad

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[1] Section 303(b)(1) of the Bankruptcy Code provides:

(b) An involuntary case against a person is commenced by the filing with the bankruptcy court of a petition under chapter 7 or 11 of this title—

(1) by three or more entities, each of which is either a holder of a claim against such person that is not contingent as to liability or the subject on a bona fide dispute, or an indenture trustee representing such holder, if such claims aggregate at least $5,000 more than the value of any lien on property of the debtor securing such claims held by the holders of such claims.

faith to collect on a letter of credit from the Continental Illinois Bank and "attempted to invoke the jurisdiction of the Bankruptcy Court to affect a contract dispute." For the reasons that follow, we affirm the dismissal of the petition.

I

Midwest Processing Company has operated a sunflower seed processing plant near Velva, North Dakota since June 1982. It executed agreements with Basin Electric, a power supplier, whereby Basin Electric would supply water and steam for the processing plant and Midwest Processing would supply seed hulls for energy production. Basin Electric needed to make modifications to its coal fired generating plant, the William J. Neal Station, in order to perform under the agreements. It invested approximately $5.8 million in the construction project. The project was completed by June 1, 1982. Midwest Processing was required to make periodic payments to Basin Electric to reimburse it for the costs of the improvements.

The bankruptcy court found that Midwest Processing has operated at a substantial loss since 1982. In 1983 and the first half of 1984, it suffered net losses totalling $14 million. From the spring of 1983 until October 1983 it had to cease de-hulling operations because its process was defective and major modifications were necessary. On February 16, 1984, Midwest Processing ceased its crushing operations and laid off large numbers of employees. Midwest Processing has a $45 million long-term debt, 90 percent of which is guaranteed by the Farmers Home Administration. The remaining $4.5 million arose out of an unguaranteed loan by several financial institutions. On February 28, 1984, Midwest Processing did not make a semi-annual interest payment of $2.8 million due to the Farmers Home Administration. It also defaulted on another $2.8 million interest payment due August 31, 1984.

From June through August of 1982, Midwest Processing maintained a $4 million deposit as security for its debt to Basin Electric. In August of 1982, it maintained as security a $5 million letter of credit in favor of Basin Electric at the Continental Illinois Bank. It was renewed in April of 1983 and was due to expire on March 31, 1984. The letter of credit contained an escrow agreement providing Basin Electric with authority to draw on the note in the event that Midwest Processing filed for voluntary bankruptcy or had filed against it an involuntary petition that remained undissolved after 60 days. There was no other security for Basin Electric's investment.

Prior to the expiration date of the letter of credit, the parties had a dispute concerning the obligation of Midwest Processing to renew the letter. Midwest Processing, believing that it had no obligation under its agreements with Basin Electric to do so, did not assure that the letter of credit would be maintained as security. On February 28, 1984, Basin Electric's accounting manager gave notice that it considered Midwest Processing in default of the agreements. The parties met to discuss the issue, but were unable to resolve their differences. Litigation is proceeding in other courts to determine the contractual obligation of Midwest Processing to provide security. Both the district court and the bankruptcy court found that there is a legitimate contractual dispute on this issue.

On March 29, 1984, Basin Electric terminated the agreements and accelerated the outstanding $5.3 million debt for improvements. The same day, it filed the involuntary petition under Chapter 11. It invoked the escrow agreement providing for drawing on the letter of credit. Indeed, there was testimony by Basin Electric, and the district court so found, that the sole purpose of the petition was to draw on the letter of

credit. Basin Electric was aware that Midwest Processing had twelve or more creditors and that involuntary petitions therefore required three or more petitioning creditors. Nevertheless, appellant filed the petition on its own and intentionally omitted reference to the number of creditors in its petition.

At the time of the petition, Basin Electric had paid its past debts except the large interest payment to the Farmers Home Administration. It owed intervenor Pump Systems $90.20 at the time of the petition and paid that amount shortly after Pump Systems intervened. It owed Dakota Fire and Safety Equipment Company, Inc. $206.69 on the date of the petition and paid that amount shortly afterward and before intervention. Both of these intervenors had advantageous business relationships with Basin Electric that they wished to protect. Both received broad indemnity agreements from Basin Electric holding them harmless from any losses or costs associated with the case. The Farmers Home Administration submitted an affidavit urging a resolution outside of bankruptcy.

II

Appellant Basin Electric argues the district court erred by dismissing the petition for filing in bad faith. Although it filed the petition with knowledge that was insufficient, it argues that it was appropriate to add other creditors after the petition was filed. Appellant relies on 11 U.S.C. § 303(c), which provides:

> After the filing of a petition under this section but before the case is dismissed or relief is ordered, a creditor holding an unsecured claim that is not contingent, other than a creditor filing under subsection (b) of this section, may join in the petition with the same effect as if such joining creditor were a petitioning creditor under subsection (b) of this section.

Appellant also relies on Rule 1003 of the Bankruptcy Rules of Procedure. Rule 1003(d) provides:

> If the answer to an involuntary petition filed by fewer than three creditors avers the existence of twelve or more creditors, the debtor shall file with the answer a list of all creditors with their addresses . . . If it appears that there are twelve or more creditors . . . the Court shall afford a reasonable opportunity for other creditors to join in the petition before a hearing is held thereon.

Appellant argues that because the three creditor requirement is not jurisdictional and may be waived, *see In re Earl's Tire Service, Inc.*, 6 B.R. 1019, 1022 (D. Del. 1980); *Collier on Bankruptcy*, ¶¶ 303.23(4), 303.15[6], it did not act in bad faith by knowingly filing a deficient petition that omitted reference to the number of creditors of Midwest Processing.

Accepting appellant's argument would circumvent unduly the three creditor requirement of section 303(b). The three creditor requirement is not a meaningless formality that a creditor may ignore until after filing the involuntary petition. While an involuntary petition may be cured after filing when a single creditor files in good faith believing the debtor has fewer than twelve creditors, a single creditor may not file an involuntary petition knowing the debtor has twelve or more creditors.

In *Myron M. Navison Shoe Co., Inc. v. Lane Shoe Co.*, 36 F.2d 454 (1st Cir. 1929), a single creditor filed an involuntary petition alleging the creditors "are less than twelve in number." *Id.* at 455. The debtor denied the allegation and submitted a list of other creditors. The court discussed the relevant number of creditors in the circumstances of the case and found that there were twelve or more. The court ordered the petition dismissed, holding it was clear from the findings

that the creditor's allegation of fewer than twelve creditors was false, recklessly made, and was a fraudulent attempt to confer jurisdiction on the court. *Id.* at 459.

Other courts have adopted the good faith requirement announced in *Navison*. The court in *In re Crofoot, Nielson & Co.*, 313 F.2d 170 (7th Cir. 1963), although remanding the district court's dismissal of an involuntary petition for further findings on the issue of fraud, *id.* at 172, held: "But if a single creditor files a petition with knowledge that the allegation (less than twelve creditors) is false, the petition will be dismissed as a fraudulent attempt to confer jurisdiction upon the court where none exists and intervention 'presumably' will be denied." *Id.* at 171 (citing, *e.g.*, *Navison*; 3 *Collier on Bankruptcy* 601-02 (14th ed. 1961)). Similarly, in *In re Crown Sportswear, Inc.*, 575 F.2d 991 (1st Cir. 1978), the court found there was no evidence of bad faith on the part of the creditor justifying dismissal of the involuntary petition, but emphasized the good faith requirement. The court stated that Rule 104(e) anticipates "that one-person petitions might be *mistaken* as to the number of creditors" and allows joinder of other petitioning creditors to cure the defect in such instances. *Id.* at 993 (emphasis added). While noting that the bankruptcy laws adopt a "charitable attitude toward petitions mistakenly asserting that there are less than twelve creditors," the court stressed that intervention as a matter of right is not allowed where the petition was "made in bad faith to invoke jurisdiction." *Id.* at 993. The court held that the petitioning creditor, although it made only a cursory investigation of the number of creditors, had not engaged in bad faith in alleging fewer than twelve creditors. The court noted, "There simply was no evidence that appellee knew or should have known that there were twelve or more creditors." *Id.*

at 994. It stressed that the burden is on the party opposing the petition to show bad faith. *Id.* at 993.

Midwest Processing in its answer made a timely challenge to the petition as did the alleged debtors in the above cases. Those cases recognized that a timely challenge to an involuntary petition alleging fewer than twelve creditors will preserve a challenge to the good faith of the petitioning creditor. This is not a case such as *In re Earl's Tire Service, Inc.*, 6 B.R. 1019 (D. Del. 1980), where the district court dismissed a challenge to a single-creditor involuntary petition because the debtor had not raised the defense in its answer. The court held the debtor had waived objection to defects in the petition.

The district court concluded correctly that it is not the making of a false statement alone that constitutes bad faith, but the wrongful attempt to commence a bankruptcy proceeding. As the bankruptcy court noted in *In re Rite-Cap, Inc.*, 1 B.R. 740, 741 (Bankr. D.R.I. 1979), "An essential prerequisite for allowing joinder of additional creditors to cure a defective petition is that the petition was filed in good faith. If the original petition was a sham, prepared with a view of being later supported by intervention of other creditors, joinder should be denied." (citations omitted). Basin Electric knew that Midwest Processing had twelve or more creditors and intentionally filed a deficient petition. Merely because the defects were subject to waiver does not excuse the intentional filing of a defective petition.

The three creditor requirement is designed to prevent use of involuntary bankruptcy proceedings by creditors as a means of harassing an honest debtor. *In re Skye Marketing Corp.*, 11 B.R. 891, 897 (Bankr. E.D. N.Y. 1981). If the three creditor requirement is to have any legal significance, it may not be

knowingly circumvented with an eye to adding other creditors later on. The sole purpose of Basin Electric was to file a petition quickly before the letter of credit expired. The parties had a contract dispute regarding the letter of credit. Basin Electric was motivated by the desire to attain an advantageous position with regard to the letter of credit. The use of the petition by Basin Electric to affect a non-bankruptcy purpose is further evidence of bad faith.

Accordingly, the decision of the district court reversing the bankruptcy court is affirmed.

A true copy.

Attest:

CLERK. U. S. COURT OF APPEALS.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 85-1063-ND

MIDWEST PROCESSING COMPANY,

Appellee,

vs.

BASIN ELECTRIC POWER COOPERATIVE,

Appellant.

Appeal from the United States District Court
for the District of North Dakota

Appellant's petition for rehearing has been considered by the Court and is hereby denied.

August 26, 1985

APPENDIX C

BASIN ELECTRIC POWER COOPERATIVE, DAKOTA FIRE AND SAFETY EQUIPMENT COMPANY, INC., and PUMP SYSTEMS, INC.,

Petitioners and Appellees,

v.

MIDWEST PROCESSING COMPANY,

Debtor and Appellant.

Civ. No. A4-84-148.

United States District Court,

D. North Dakota,

Northwestern Division.

Dec. 14, 1984.

Neal L. Wolf and Robert R. Steffek, Jr., Chicago, Ill., Timothy Q. Davies, Fargo, N.D., William P. Westphal, U.S. Trustee, Minneapolis, Minn., for debtor and appellant.

Bruce E. Bohlman, Grand Forks, N.D., for Basin Elec. Power Co-op.

Jack McDonald, Jr., Bismarck, N.D., for Dakota Fire & Safety Equipment Co.

Michael Maus, Dickinson N.D., for Pump Systems, Inc.

MEMORANDUM AND ORDER

VAN SICKLE, District Judge.

This is an appeal from a May 24, 1984 order for relief entered by the United States Bankruptcy Court for the District of North Dakota. On March 29, 1984, Basin Electric Power Cooperative (Basin) filed an involuntary petition against Midwest Processing Company (Midwest) under Chapter 11 of the Bankruptcy Code. Midwest opposed that petition. The contested petition was tried to the Bankruptcy Court on May 4 and 5, 1984, and the order now on appeal was entered fol-

lowing that trial. On Midwest's motion, the Bankruptcy Court stayed its order for relief pending this appeal.

FACTS

Midwest was formed in 1979 and has operated a sunflower processing plant near Velva, North Dakota since June of 1982. (R.A. 33 at 2.)[1] Midwest's stock is currently owned by Pillsbury Company (46%), A.E. Staley Company (46%), and Neshem-Peterson & Associates (8%). (R.A. 51 at 231).

Basin is a non-profit supplier of wholesale electric power. One of Basin's generating plants, the William J. Neal Station (Neal Station), is located near Velva, North Dakota and is an integral part of Midwest's operation. The Neal Station is a lignite coal-fired base load generating station. (R.A. 51 at 204).

On December 12, 1980, Midwest and Basin executed agreements whereby Basin was to supply Midwest with processed steam and demineralized water and Basin in turn was to purchase sunflower seed hulls from Midwest. The sunflower seed hulls were to be burned through Basin's generating operations. To accommodate those agreements, it was necessary for Basin to undertake a construction project at the Neal Station to make steam and water related improvements and to construct hull handling facilities. Basin invested approximately $5.8 million in these improvements (R.A. 51 at 100); that cost was to be recovered through charges to Midwest, including charges for depreciation and interest on Basin's investment cost, charges for steam and water used by Midwest (R.A. 51 at 258), and "capacity payments" to cover that portion of Basin's operating and maintenance costs attributable to Midwest's operation. (R.A. 51 at 211). The agreements provided that Basin would give a one year notice of termination. (R.A. 51 at 145).

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[1] R.A. refers to Record on Appeal.

To secure Basin's investment, Midwest maintained a $4 million deposit at First National Bank of Minneapolis from June, 1982 through August, 1982. (R.A. 51 at 131). Beginning in August, 1982, Basin's investment was secured through a $5 million letter of credit at Continental Illinois National Bank and Trust Company of Chicago (Continental Illinois). That letter of credit was renewed in April, 1983 and was to expire on March 31, 1984. (R.A. 51 at 132). In conjunction with the letter of credit, Basin and Midwest entered into an escrow agreement detailing the terms under which the parties could draw on the letter of credit. One of the conditions under which Basin could draw on the letter of credit was if a petition in bankruptcy was filed against Midwest and if that petition was not dismissed for a period of sixty days. (R.A. 51, Ex. 12).

Basin made a tax benefit transfer of the facilities constructed to accommodate Midwest's operation. That tax benefit transfer generated approximately $2.5 million in revenue to Basin. (R.A. 51 at 183).

Midwest has outstanding long-term debt in the amount of $45 million, 90% of which is guaranteed by the Farmers Home Administration (FmHA). (R.A. 51 at 142). The portion of the long-term debt which is not guaranteed is held by sixteen area financial institutions. Midwest is obligated to make semi-annual interest payments on its long-term debt of approximately $2.8 million and to begin repayment of principal in 1985. Midwest did not make the interest payment due on February 28, 1984. (R.A. 51 at 142). Prior to initiation of the bankruptcy proceedings, Midwest had been negotiating a restructuring of its long-term debt. (R.A. 51 at 344).

Sometime in February, 1984, Midwest shut down its sunflower processing operation and laid off some of its employees. Because of Midwest's plant shut down, Basin was concerned for the security of its investment. (R.A. 51 at 134).

For several months prior to this time, the parties had been discussing renewal of the Continental Illinois letter of credit. Basin argues that the agreements between it and Midwest require that Midwest maintain either a payment bond or a letter of credit in an amount and in a form reasonably acceptable to Basin as security for receipt of the payments Midwest is required to make under their agreements. Midwest did not provide Basin the assurances it desired that a letter of credit would be maintained. On February 28, 1984, Basin gave notice that it considered Midwest's failure to provide those assurances a default under the agreements. (R.A. 51, Ex. 15).

On March 20, 1984, Midwest's financial situation was discussed at a meeting between representatives of Midwest, Basin, Pillsbury Company, and A.E. Staley Company. Midwest outlined its efforts to restructure its long-term debt, Pillsbury Company's efforts to buy out the unguaranteed long-term note holders, and Pillsbury Company's efforts to sell its interest in Midwest to A.E. Staley Company. Midwest sought Basin's assurance that it would continue to provide services for a three-and-one-half year period as well as a reduction in Basin's steam and water charges. On March 23, 1984, Midwest informed Basin that Midwest did not intend to renew the letter of credit. By letter dated March 29, 1984, Basin gave notice of termination of the agreements based on Midwest's failure to cure the default asserted in Basin's February 28, 1984 letter. (R.A. 51 at 149). Basin demanded that Midwest pay the entire outstanding principal and interest due on the cost of the Neal Station improvements, an amount Basin calculated to be approximately $5.3 million. Midwest disputed its contract obligation to maintain the letter of credit, and disputed Basin's assertion that the failure to provide such letter of credit gave rise to default under the parties' agree-

ments. The effect of Basin's draw on the letter of credit was to make Continental Illinois a creditor of Midwest and so to reduce the funds available for payment of other creditors. (R.A. 51 at 158). After Basin's draw on the letter of credit, Midwest's only remaining debt to Basin is approximately $300,000, and that debt is in dispute.

The parties agree that Midwest made all payments required under their agreements except for the accelerated balance which is disputed. (R.A. 51 at 108). Midwest, however, vigorously disputes its obligation to pay the accelerated balance arising by virtue of Basin's declaration of default and termination of the agreements. (R.A. 51 at 103). That dispute is the subject of state court litigation. Midwest was current on payments to other creditors with the exception of the interest on its long-term debt. (R.A. 51 at 289-90).

The Neal Station is, at least at certain times, Basin's costliest generating facility. Midwest asserts that Basin has determined it would be in Basin's best interest if Midwest were to cease operation so that Basin would no longer have any contractual obligation to keep the Neal Station operational. (R.A. 51 at 215-26).

On March 29, 1984, the same day on which it declared Midwest to be in default, Basin filed the bankruptcy petition against Midwest. No other Midwest creditors joined in the petition. Midwest moved to dismiss the petition for lack of three creditors as required under 11 U.S.C. § 303(b)(1). The Bankruptcy Court denied that motion without prejudice and gave Basin an opportunity to solicit intervening creditors. The Bankruptcy Court directed that notice of the proceedings be given to other creditors. (R.A. 49 at 20).

On April 30, 1984, Dakota Fire and Safety Equipment Company, Inc. (Dakota) moved to intervene. Midwest had owed

Dakota $206.69 on the date the petition was filed; that debt was paid on April 13, 1984. Also on April 30, 1984, Apollo Piping Supply, Inc. and Minot Auto Supply moved to join in the petition; Apollo Piping Supply, Inc. and Minot Auto Supply both later withdrew their motions. On May 4, 1984, Pump Systems, Inc. (Pump Systems) moved to intervene. Midwest had owed Pump Systems $90.28 on the date the petition was filed; that amount was paid in full shortly thereafter. Both Dakota and Pump Systems entered into indemnity agreements with Basin which protected them from costs associated with the bankruptcy proceeding. (R.A. 51 at 71). Both Dakota and Pump Systems have joined in Basin's brief on appeal.

At trial, Midwest submitted affidavits of eleven of the sixteen financial institutions which hold Midwest's unguaranteed debt; each affidavit stated that the institution desired that the bankruptcy proceedings be dismissed. (R.A. 23). Midwest also submitted an affidavit of FmHA stating that it was involved in discussions regarding restructuring of Midwest's long-term debt and that it desired a resolution outside the bankruptcy proceedings. (Attachment to R.A. 21).

At the close of Basin's presentation at trial, Midwest moved to dismiss the petition on grounds that Basin had known of the existence of more than twelve Midwest creditors at the time it filed the involuntary petition but had failed to join two other creditors as required under 11 U.S.C. § 303(b)(1), that not all of the petitioning creditors alleged all elements of an involuntary proceeding, that the petition and motions to intervene were filed in bad faith, and that dismissal would be in the best interests of the debtor and its creditors. The Bankruptcy Court again denied Midwest's motion to dismiss.

ISSUES

On appeal, Midwest alleges error in four rulings of the Bankruptcy Court: 1). failing to dismiss Basin's petition for failure to join two other creditors and permitting the intervention of other creditors, 2). failing to dismiss by reason of Basin's bad faith, 3). entering an order for relief when all three petitioning creditors did not allege all elements of an involuntary case, 4). finding that Midwest is generally not paying its debts as those debts become due.

STANDARD OF REVIEW

This Court must first determine the standard under which the decision of the Bankruptcy Court is to be reviewed. Midwest argues that the applicable standard of review is that found in the temporary local rules adopted by this Court following the Supreme Court's decision in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 102 S.Ct. 2858, 73 L.Ed.2d 598 (1982).[2] Under that local rule, the findings of the bankruptcy court were accorded no deference when reviewed by the district court. The petitioning creditors argue that this Court must apply instead a clearly erroneous standard; they assert that standard applies because the Bankruptcy Amendments and Federal Judgeship Act of 1984 (BAFJA) establishes a clearly erroneous standard for review of cases referred to the bankruptcy court by reason of a standing order of the district court.

This Court concludes, though for reasons other than those urged by the creditors, that the findings of the bankruptcy court must be reviewed under the clearly erroneous standard. Subsequent to adoption of the temporary local rule, the Su-

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[2] *In the Matter of the Adoption of an Emergency Resolution Relating to Bankruptcy*, (D.N.D. Apr. 9, 1984).

preme Court promulgated new bankruptcy rules.[3] Included in those rules is Rule 8013, which provides:

> On an appeal the district court . . . may affirm, modify, or reverse a bankruptcy court's judgment, order, or decree or remand with instructions for further proceedings. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the bankruptcy court to judge the credibility of the witnesses.

This Court has previously held that, given Rule 8013 and the Eighth Circuit's approval of the clearly erroneous standard, decisions of the bankruptcy court will be reviewed under the clearly erroneous standard. *In re Clothes, Inc.*, 40 B.R. 997 (D.N.D. 1984). This Court will adhere to its earlier decision. *See also In re Morrissey*, 717 F.2d 100, 104 (3d Cir. 1983); *Kressel v. Kotts*, 34 B.R. 388, 391 (D.Minn. 1983). The order of the Bankruptcy Court will be reviewed under the clearly erroneous standard.

THREE CREDITOR REQUIREMENT

The Bankruptcy Code defines the requirements for commencement of an involuntary case as follows:

> An involuntary case is commenced by the filing with the bankruptcy court of a petition under chapter 7 or 11 of this title
>
> (1) by three or more entities, each of which is either a holder of a claim against such person that is not contingent as to liability . . . if such claims aggregate at least $5,000 more than the value of any lien on property of the debtor securing such claims held by the holders of such claims;

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[3] Under 28 U.S.C. § 2075, bankruptcy rules prescribed by the Supreme Court took effect ninety days after they were reported to Congress.

> (2) if there are fewer than 12 such holders . . . by one or more of such holders that hold in the aggregate at least $5,000 of such claims . . . .

11 U.S.C. § 303(b). Under this statute, a single creditor can commence an involuntary case only if the debtor against whom the proceeding is commenced has fewer than twelve creditors.

On March 29, 1984, when Basin filed the involuntary petition against Midwest, Midwest had over 100 creditors. Basin's petition made no allegation that Midwest had fewer than twelve creditors; nor did it allege that Midwest had twelve or more creditors. Basin simply ignored the three creditor requirement of § 303(b), even though Basin knew that Midwest had twelve or more creditors. (R.A. 51 at 384).

The Bankruptcy Court subsequently allowed other creditors to join in the petition so as to meet the three creditor minimum. The Bankruptcy Code includes the following provision on joinder by other creditors:

> After the filing of a petition under this section but before the case is dismissed or relief is ordered, a creditor holding an unsecured claim that is not contingent, other than a creditor filing under subsection (b) of this section, may join in the petition with the same effect as if such joining creditor were a petitioning creditor under subsection (b) of this section.

11 U.S.C. § 303(c). Despite the liberal joinder envisioned under § 303(c), the three creditor requirement of § 303(b) would be rendered meaningless if subsequent joinder of additional parties were sufficient in all cases where fewer than three creditors originally commenced an involuntary case against a debtor who has twelve or more creditors. Section 303(c) may properly be invoked where a single petitioning creditor is unaware that a debtor has twelve or more creditors.

But where, as in this case, a single creditor commences an involuntary case despite knowledge that the debtor has twelve or more creditors, the petition is deficient and should be dismissed absent special circumstances.

This ruling is in accord with prior case law and with the purposes behind the statutory scheme for filing involuntary petitions in bankruptcy. Other courts have recognized that a single creditor who has knowledge that a debtor has twelve or more creditors, but who nonetheless files an involuntary petition without the requisite three creditors acts in bad faith. *See In re Crofoot, Neilson & Co.*, 313 F.2d 170, 171 (7th Cir. 1963); *Navison Shoe Co. v. Lane Shoe Co.*, 36 F.2d 454 (1st Cir. 1929). When such a petition is filed in bad faith, later joinder of additional creditors has been denied. *In re Rite-Cap, Inc.*, 1 B.R. 740, 741 (Bankr.R.I. 1979); *In re Crown Sportswear, Inc.*, 575 F.2d 991, 993 (1st Cir. 1978). *See also* Weintraub & Resnick, *Involuntary Petitions Under the New Bankruptcy Code*, 97 Banking L.J. 292, 304 (1980); 2 Collier on Bankruptcy ¶ 303.33 (15th ed. 1984). *But cf. Matter of Trans-High Corp.*, 3 B.R. 1 (Bankr.S.D.N.Y. 1980).

The statutory three creditor requirement reflects the purpose of an involuntary bankruptcy proceeding as envisioned by Congress: to protect the interests and desires of the creditors as a whole. That reasoning has application to the facts of this case. Those creditors holding the largest claims against Midwest do not desire a bankruptcy proceeding, but were attempting instead to reach an out-of-court restructuring agreement before Basin filed the involuntary petition. Indeed, Basin's unsecured debt represents a small fraction of Midwest's total debt. Filing an involuntary petition may have been in the best interests of Basin, but was not seen by Midwest's other creditors as being in their best interests.

Basin's claim against Midwest is the subject of a significant dispute between the parties both as to liability and as to amount. Accordingly, the Bankruptcy Court did not consider Basin's claim in determining whether Midwest was generally not paying its debts as they became due. (R.A. 33 at 21). That Midwest's debt to Basin cannot be considered as evidence of nonpayment of debts is further reason for strict adherence to the three creditor requirement.

This Court concludes that the Bankruptcy Court erred in not dismissing Basin's petition against Midwest for failure to meet the three creditor requirement of § 303(b).

ALLEGATIONS OF BAD FAITH

Midwest alleges that the Bankruptcy Court erred in failing to dismiss the petition by reason of Basin's bad faith in filing the involuntary petition. Midwest asserts that Basin's only purpose in filing the petition was to draw on the Continental Illinois letter of credit and that such a purpose is not consistent with the objectives of the Bankruptcy Code. Midwest asserts that this is essentially a contract dispute between Basin and Midwest and should more properly be resolved in a contract action.

In evaluating Midwest's allegations of bad faith, the Bankruptcy Court refused to consider Basin's subjective motives in filing the involuntary petition. (R.A. 33 at 23). The Bankruptcy Court considered Basin's conduct against a standard of whether a reasonable person in the position of the petitioning creditor would have initiated the bankruptcy proceeding. (R.A. 33 at 26).

This Court is convinced that the Bankruptcy Court should have considered Basin's subjective motivations together with its conduct in reaching a determination on the question of bad faith. Though it is often difficult to ascertain a peti-

tioning creditor's subjective motivations, other courts have considered those motivations when they could be ascertained. *See, e.g., In re Hunt,* 496 F.2d 882 (5th Cir. 1974) (affirmed dismissal of involuntary petition where petitioning creditor had not acted in good faith during course of settlement negotiations); *Matter of Win-Sum Sports, Inc.,* 14 B.R. 389 (Bankr.D.Conn. 1981) (involuntary petition dismissed where parties attempted to use bankruptcy court as alternative to state court procedures to resolve intra-company management and stockholder problems); *In re G-2 Realty Trust,* 6 B.R. 549 (Bankr.D.Mass. 1980) (dismissed involuntary petition where entity had changed from a nominee trust to a business trust solely to become eligible to qualify as debtor for Chapter 11 purposes).

Considering subjective motivations of petitioning creditors is analogous to considering possible ulterior motives of petitioning debtors in voluntary bankruptcy proceedings. It has long been recognized that using the bankruptcy process to promote individual interests in a manner not consistent with the legislative purposes of the Bankruptcy Code is an abuse of the jurisdiction of the bankruptcy courts. *See, e.g., In re Nancant, Inc.,* 8 B.R. 1005 (Bankr.D.Mass. 1981) (dismissed voluntary petition where debtor's sole purpose in filing was to avail itself of the bankruptcy court's jurisdiction to hear and determine its real estate tax controversy); *In re Noonan,* 17 B.R. 793 (Bankr.S.D.N.Y. 1982) (refused to confirm reorganization plan where sole purpose in filing voluntary petition had been to avoid contractual obligations). *See also* Ordin, *The Good Faith Principle in the Bankruptcy Code: A Case Study,* 38 Bus.Law. 1795 (1983).

Basin's motivation for filing the involuntary petition is easily ascertained. The manager of Basin's Department of

Accounting and Finance testified at trial, and his testimony included the following:

> Q. What did you tell him was the reason why the petition was filed with the Court?
>
> A. That the letter of credit which was the only security that Basin Electric had under a contract with Midwest Processing, expired, and that we had no recourse but to draw down on the letter of credit which required the filing of the petition.
>
> Q. Was that the sole reason you gave . . . regarding the filing of the bankruptcy petition?
>
> A. The reason for our action. That was the sole reason for our action in effect.

(R.A. 51 at 396). Minutes of a March 20, 1984 meeting of certain Basin personnel include the following statement:

> [I]t was determined that Basin Electric should make the necessary preparations to draw on the letter of credit. It was explained that the only sure way to draw on the letter is to file an involuntary petition in bankruptcy against Midwest. To do that, Basin Electric would, at a minimum, need two and perhaps three other Midwest creditors.

(R.A. 51, Ex. 47).

Basin filed the involuntary petition to put itself in a more advantageous position with respect to the Continental Illinois letter of credit. In so doing, Basin attempted to invoke the jurisdiction of the Bankruptcy Court to affect a contract dispute. In light of Basin's motivations for filing the involuntary petition, this Court concludes that the Bankruptcy Court erred in not dismissing the petition by reason of Basin's bad faith. *See In Re Rush*, 10 B.R. 526 (Bankr.N.D.Ala. 1981) (if issue of bad faith is decided against original petitioners, peti-

tion should be dismissed regardless of later intervention by other creditors).

Midwest also alleges that Dakota and Pump Systems moved to intervene in bad faith and that because of their bad faith, their intervention should not have been allowed. Midwest asserts that both joined in the petition only out of concern for their business relations with Basin and only after Basin made broad indemnity agreements with them. Both Dakota and Pump Systems held unsecured and undisputed, though seemingly insignificant, claims against Midwest when the petition was filed. Though there is evidence suggesting Dakota and Pump Systems were actually motivated to file their motions because they wanted to protect their business relationships with Basin, this Court cannot conclude that the Bankruptcy Court committed clear error in finding that neither Dakota nor Pump Systems acted in bad faith.

ALLEGING ALL ELEMENTS OF INVOLUNTARY CASE

Midwest alleges error in not dismissing the involuntary petition on grounds that each of the petitioning creditors did not allege each of the essential elements of an involuntary case. Section 303(h) provides:

> [T]he court shall order relief against the debtor in an involuntary case . . . only if . . . the debtor is generally not paying such debtor's debts as such debts become due . . . .

Midwest asserts that, because neither Dakota nor Pump Systems specifically alleged that Midwest was not generally paying its debts as those debts became due, neither Dakota nor Pump Systems effectively joined in the involuntary petition. Both motions to join the involuntary petition stated:

> [T]he undersigned hereby joins in the Petition for Involuntary Reorganization . . . filed by Basin Electric Power Cooperative in the above-entitled matter . . . .

(R.A. 18, 22). Basin's petition specifically alleged that Midwest was generally not paying its debts as they became due. The statements of joinder in Basin's petition are sufficient allegation by both Dakota and Pump Systems of each of the essential elements of an involuntary case.

Midwest next argues that testimony of representatives of Dakota and Pump Systems constituted disclaimers of the allegations contained in the motions to join the petition. The testimony of Pump System's president included the following:

> Q. Do you sit here today under oath and allege that Midwest has not been paying its debts as they fall due?
>
> A. No.
>
> Q. You are not saying that Midwest has not been paying its debts as they fall due?
>
> A. No, I'm not.

(R.A. 51 at 34). The testimony of Dakota's president included the following:

> Q. . . . Is it your contention that Midwest is not paying their creditors generally as their debts become due?
>
> A. They are paying my debts. As far as all the general creditors, I'm not aware.
>
> Q. You don't know one way or the other whether they're paying their creditors?
>
> A. The only thing I could go by there was the fact that they defaulted on a payment. And it was on radio and TV and then the newspaper.

(R.A. 51 at 60-61). However, neither Dakota nor Pump Systems withdrew its motion to intervene.

The testimony quoted above was part of the evidence available to the Bankruptcy Court when reaching its determination of whether Midwest was generally not paying its debts as debts became due. While the testimony might lead one to question the sincerity of Dakota and Pump Systems, the testimony concerns the merits of the petition rather than the sufficiency of the motions. This Court finds no error in the Bankruptcy Court's denial of Midwest's motion to dismiss for failure of each of the petitioners to join in each essential element of an involuntary case.

MERITS OF THE PETITION

Having concluded that the Bankruptcy Court erred in not dismissing the involuntary petition for failure to meet the three creditor requirement and by reason of Basin's bad faith in filing the petition, it is not necessary that this Court address the final issue raised by Midwest: that the Bankruptcy Court erred in its finding that Midwest is generally not paying its debts as such debts become due.

CONCLUSION

For the foregoing reasons, IT IS ORDERED:

1). That the May 24, 1984 order of the Bankruptcy Court is reversed.

2). That the involuntary petition is dismissed.

3). That judgment be entered accordingly.

APPENDIX D

In re MIDWEST PROCESSING COMPANY,
Debtor.

Bankruptcy No. 84-05165.
United States Bankruptcy Court,
D. North Dakota.
May 24, 1984.

Bruce Bohlman, Grand Forks, N.D., and Michael Hinman, Bismarck, N.D., for Basin.

Neal Wolf; Timothy Davies and David T. DeMars, Fargo, N.D., for Midwest.

Michael J. Maus, Dickinson, N.D., for Pump Systems, Inc.

Jack McDonald, Bismarck, N.D., for Dakota Fire & Safety Equip. Co.

MEMORANDUM OPINION

WILLIAM A. HILL, Bankruptcy Judge.

Basin Electric Power Cooperative [Basin Electric] filed with the Court on March 29, 1984, an involuntary petition requesting that the Court order Chapter 11 relief for the alleged Debtor, Midwest Processing Company [Midwest]. Midwest filed with the Court on April 6, 1984, a "Motion for Order of Dismissal and Damages," a "Motion for Judgment" under section 303(i) of the Bankruptcy Code, and a "Motion to Dismiss" pursuant to section 303 of the United States Bankruptcy Code. An expedited hearing on the motions to dismiss was held before the undersigned on April 11, 1984. Pursuant to the expedited hearing, an Order Denying the Motions to Dismiss was entered on April 16, 1984, and a hearing on the Order for Relief was set for May 4, 1984. Midwest filed its Answer to the involuntary petition on April 20, 1984. Motions

to join as petitioners in this proceeding were filed on April 30, 1984, by Minot Auto Supply, Dakota Fire and Safety Equipment Company, and Apollo Piping Supply, Inc. A further motion to join as petitioner in this proceeding was filed on May 3, 1984, by Pump Systems, Inc. A Disclaimer and Withdrawal of Motion to Intervene or to Join has been filed by both Minot Auto Supply, Inc., and by Apollo Piping Supply, Inc. Midwest filed on May 3, 1984, a Motion to Dismiss pursuant to section 305(a)(1) of the Bankruptcy Code. A hearing on the request for an Order for Relief was held on May 4, 1984 and continued to and concluded on May 5, 1984. After consideration of the evidence as submitted at trial and the briefs of the parties, the Court finds the relevant facts to be as follows:

FINDINGS OF FACT

MIDWEST PROCESSING COMPANY

Midwest operates a sunflower processing plant near Velva, North Dakota. The company was formed in 1979 as a joint venture between the Pillsbury Company and Neshem-Peterson & Associates. Later, the A.E. Staley Company of Decatur, Illinois joined the venture and presently the corporate stock of the company is owned in the following percentages: 46% Pillsbury Company; 46% A.E. Staley; and 8% by Neshem-Peterson.

Statements of operations from Midwest reflect that the company has operated at a substantial loss since 1982. Midwest had net earnings of $4,540,932.00 in 1982. The sale of tax benefits in 1982 afforded Midwest $12,000,000.00 in income. Without the tax benefits, Midwest had an operating loss of $3,700,625.00 in 1982. The financial statements also indicate a net loss of $7,742,044.00 for Midwest in 1983. The statements show an overall decrease of approximately $4,000,-

000.00 in Midwest's assets from 1982 to end of fiscal year 1983. Midwest's net loss of operations in the first seven months of fiscal year 1984 total $7,068,683.00.

Midwest shut down their processing facility in the Spring of 1983 until October 1983. Basin Electric understood at that time that the design in Midwest's de-hulling process was flawed and that the 1983 shut-down was to afford Midwest a one-time opportunity to make major modifications in their processing facility. Midwest again shut down their operations in mid-February of 1984. The processing plant ceased its operations in February of 1984 when it became apparent that it would not be profitable to continually run the processing facility. In late February and early March 1984, Midwest laid off 52 employees. Midwest presently employs 17 people, ten of which are office personnel. It is contemplated the plant will not be reopened until an acceptable crush margin is attained. Midwest cannot insure that margins will favor reopening of the processing facility at the time of the 1984 harvest. Midwest does contemplate, however, that the plant may be reopened even if the margins are not favorable merely to maintain visibility and instill confidence in their continued operations among the sunflower growers in the area. At the time of trial, Midwest still had not resumed crushing operations.

Although Midwest has been operating at a continual loss since it opened its plant in 1982, it has generally been paying its bills on a current basis. Midwest has been able to keep current on its payments because of injections of capital made by its stockholders. The Pillsbury Company and the A.E. Staley Company in August 1983 each provided 2.25 million dollars to Midwest Processing. Additionally, Pillsbury and Staley Company jointly injected $300,000.00 of capital into the oper-

ations of Midwest in April 1984. Midwest repaid Pillsbury and Staley for its August 1983 cash advances through an issuance of more stock in Midwest. Additional operating funds were generated by the sale of 120 tons of sunflower seed which remained on hand after the processing plant ceased its operations in February 1984.

At the time of trial, creditors which remained unpaid were, as follows:

	CREDITOR	CLAIM	REASON FOR NON-PAYMENT
1.	W.C. Cantrell	$ 121,875.80	Claim is not payable until Cantrell receives specifications for work done.
2.	McHenry County Auditor	$ 173,627.43	Tax bill is disputed.
3.	National Sunflower Association	$ 4,441.37	Association-type charge which is not required at this time.
4.	Texas Instruments Company	$ 10.00	No invoice for the work has been received.
5.	Western Railroad Association	$ 445.07	Invoice was received on April 30, 1984.
6.	Brokerage Services	$ 3,043.00	No invoices for the services have been received.
7.	Commodity Purchase Contracts	$1,474,150.00	Contracts are for future periods and are not currently due.
8.	Open Purchase Orders	$ 5,003.40	Midwest hasn't received bills or the goods on those purchases.

The list of current obligations which are set out above do not include a disputed obligation to Basin Electric Power Cooperative, nor does it include pre-petition claims of the stockholders, which were as follows:

Neshem-Peterson	$ 97,655.36
Pillsbury	$201,196.39
A.E. Staley	$397,607.78

The pre-petition claims of the stockholders listed above do not reflect the recent cash injection of $300,000.00. Midwest asserts that the stockholders have not requested payment on any of its pre-petition claims and in fact are allowing Midwest to

defer payment on those obligations. Outside of the disputed obligation to Basin Electric Power Cooperative, the most significant obligation Midwest has is to its long-term note holders.

Midwest has what it cites as a long-term obligation in the principal amount of $45,000,000.00. Of that long-term obligation, 90% of it is guaranteed by the Farmers Home Administration. The payments on the principal amount of the loan do not begin until 1985. Midwest is obligated, however, to make semi-annual payments of interest up until the year 1985. An interest payment of $2,786,062.61 was due February 28, 1984. Midwest did not make the payment due on February 28, 1984, and since that time has been negotiating with the note holders for a new payment schedule. Under the payment schedule which now exists, another interest payment of $2,-786,062.61 is due on August 31, 1984.

Midwest acknowledges its poor financial position. Nevertheless, Midwest resists formal reorganization through a bankruptcy proceeding. Midwest cites the past support of its shareholders and a potential work-out arrangement as evidence that a formal bankruptcy proceeding is not necessary in this instance. If Midwest's creditors agree to the work-out proposals, Midwest anticipates resuming its operations in the Fall 1984. The work-out proposal which Midwest has been negotiating with its creditors is essentially to defer payments, both principal and interest, on its long-term obligations for three years. After that period of three years, Midwest would then begin semi-annual payments on both principal and interest. The work-out proposal contemplates that the Farmers Home Administration will become the holder of notes which evidence the guaranteed portion of the long-term debt. The proposal also contemplates that the 4.5 million dollar unguar-

anteed portion of the long-term debt will be bought out by Pillsbury at a percentage of its face value. An adjunct to the work-out proposal is a separately proposed agreement whereby A.E. Staley Company will purchase Pillsbury's interest in Midwest.

Fifteen out of sixteen participating unguaranteed note holders have executed preliminary agreements, which Pillsbury characterizes as conditional agreements, to assign their notes to Pillsbury in exchange for 75% of the face value of the note. The conditions contained in the agreements are summarized, as follows:

1. The involuntary bankruptcy proceeding is dismissed.
2. New or amended agreements are executed between Basin and Midwest regarding the supply of processed steam and water and the purchase of sunflower hulls.
3. The long-term debt is restructured.
4. All participating unguaranteed note holders execute and deliver their conditional assignment agreement to Pillsbury.
5. Pillsbury receives the opinion of its counsel with regard to the transactions contemplated.
6. The separation agreement between Pillsbury and A.E. Staley dated April 23, 1984, is closed.

The conditions contained in the agreements executed by the participating unguaranteed note holders must be met on or before June 30, 1984, or the conditional agreements become null and void. Twelve of the sixteen participating unguaranteed note holders have filed with the Court affidavits supporting Midwest's requests for dismissal of the involuntary bankruptcy proceeding. Officers from Pillsbury, A.E. Staley Company, and Midwest all acknowledge, however, no work-out arrangement will be possible without reaching an adequate agreement with Basin Electric.

BASIN ELECTRIC POWER COOPERATIVE

The initial petitioner, Basin Electric Power Cooperative, is intimately involved in the operations of Midwest through its William J. Neal Station, a lignite coal-fired baseload generating plant located near Velva, North Dakota. Basin Electric purchased the Neal Station from Central Power Electric Cooperative in 1973. The Neal Station is Basin Electric's smallest and most expensive lignite generating plant. Basin Electric is a non-profit wholesale power supplier. Accordingly, Midwest receives its power from a local power cooperative and not from Basin Electric. Basin Electric does supply Midwest with processed steam and demineralized water. Basin Electric in turn purchases from Midwest sunflower seed hulls which are burned through Basin Electric's generating operations. Basin Electric and Midwest executed on December 12, 1980, separate agreements for the sale of water and steam and the sale of sunflower seed hulls. In order to service the agreements, Basin Electric began a sunflower construction project which included steam and water related improvements and construction of hull handling facilities at the Neal Station. Basin Electric's total investment in the sunflower improvements amounted to $5,829,450.71. Basin Electric contemplated that it would recover the cost of the sunflower improvements through charges outlined under the agreements dated December 12, 1980, which included as a component, depreciation and interest on the investment cost of the facilities that Basin Electric constructed in order to furnish its services to Midwest.

The sunflower construction project was completed June 1, 1982, and Midwest began operations that date. From June 1982 until August 1982, Midwest maintained a $4,000,000.00 deposit at the First National Bank of Minneapolis as security

for Basin Electric's investment in improvements under the sunflower construction project. In August of 1982 a letter of credit with the Continental Illinois Bank was put into effect in order to secure Basin Electric's investment in the sunflower project. The letter of credit was renewed in April of 1983 and was set to expire on March 31, 1984. In conjunction with the letter of credit, an escrow agreement which detailed the terms under which the parties could draw on the letter of credit was executed and extended by the parties to correspond with the terms of the letter of credit. The escrow agreement provided, in part, that the parties could draw on the letter of credit, as follows:

> As Escrowee, you are hereby directed to hold, deal with and dispose of the aforesaid property and any other property at any time held by you hereunder in the following manner, subject however, to the terms and conditions hereinafter set forth:
>
> . . . . .
>
> You shall pay over all monies and investments held hereunder (including all earnings thereon) either (i) to Basin, upon presentation to you of a certified copy of a petition filed against Midwest Processing Company ("MPC") a North Dakota corporation, under the United States Bankruptcy Code, as amended, and a certificate of the Secretary of Basin stating that such petition remains undismissed for a period of sixty days since filing, or (ii) to Continental, upon presentation to you of a certificate of the Secretary of MPC stating that any petition filed against MPC under the United States Bankruptcy Code, as amended, has been dismissed.

Midwest asserts that Basin Electric's sole motivation for petitioning for involuntary relief as against Midwest was to

draw on the letter of credit established to secure Basin Electric's investment costs in its sunflower project. Midwest alleges that when Basin Electric filed the involuntary petition with the sole motivation to draw on the letter of credit, it filed the petition in bad faith. Although Basin Electric admits that the pending expiration of the letter of credit triggered the filing of the bankruptcy petition, the expiration of the letter of credit was only the last in a parade of events which took place throughout the beginning of 1984 which gave rise to growing concern on the part of Basin Electric over the future operations of Midwest.

Basin Electric initially became concerned over the situation with Midwest when Midwest ceased its operations February 16, 1984. Soon after that date, Midwest began laying off large numbers of its employees. On February 23, 1984, Arnold Ketterling, manager of the Department of Accounting and Finance for Basin Electric wrote to the President of Midwest, Tom Brokl, wherein Ketterling requested that Midwest insure that a letter of credit would be maintained after March of 1984 to secure Midwest's payments under its contracts with Basin Electric. A new letter of credit had been a source of discussions between Basin Electric and Midwest since September 1983. Basin Electric has consistently taken the position that sections 10.1 of the Water and Steam Sales Agreement and the Sunflower Seed Hull Sales Agreement required that Midwest provide and maintain either a payment bond or a letter of credit in an amount and in a form reasonably acceptable to Basin Electric as security for receipt of the payments Midwest was required to make under the contracts. Midwest was unable to assure Basin Electric in response to its letter of February 23, 1984, that a letter of credit would be maintained as security. As a result, Arnold Ketterling again

wrote Thomas Brokl on February 28, 1984, giving Midwest notice that they were in default under the contracts by failing to provide adequate assurance that a letter of credit would be maintained. The letter dated February 28, 1984, also indicated that the default could be cured by a renewal of the present letter of credit for a period of ninety (90) days. On February 28, 1984, Midwest also missed payment of the interest due that date on its long-term loan obligation.

A meeting was held March 20, 1984, at the offices of Basin Electric between representatives of Basin Electric, Midwest, Pillsbury, and A.E. Staley Company. Tom Brokl, President of Midwest, outlined market conditions in the sunflower industry, the competition between area sunflower processing plants, and the stresses those factors placed upon Midwest's position in the marketplace. Tom Brokl acknowledged that Midwest had missed an interest payment on its long-term debt due February 28, 1984, and explained Midwest's efforts at restructuring payments on that debt. Brokl also explained Pillsbury's efforts at buying out the unguaranteed long-term note holders, and likewise Pillsbury's efforts to sell its interest in Midwest to A.E. Staley Company. Finally, Brokl requested that as part of the reorganization of Midwest that Basin Electric guarantee services for three and one-half years and also reduce its steam and water charges by approximately 25%. Basin Electric did not receive any assurance at the meeting that the letter of credit would be maintained as security for receipt of the payments due it under the contracts.

Arnold Ketterling phoned Tom Brokl on March 23, 1984, expressing concern that Basin Electric had yet received no assurance that Midwest would maintain the letter of credit. Tom Brokl informed Ketterling during that conversation that he had no authority to make any assurances and that Midwest

did not intend to renew the letter of credit. By letter dated March 29, 1984, and addressed to Tom Brokl, President of Midwest Processing Company, Ketterling terminated the contract agreements based on Midwest's failure to cure the default which was noticed by Basin Electric in its letter dated February 28, 1984. In conjunction with the termination on March 29, 1984, Basin Electric demanded from Midwest the outstanding principal and interest on the cost of the sunflower improvements. Basin Electric calculates that Midwest's debt on March 29, 1984, for the sunflower improvements amounted to $5,346,755.00. Midwest strenuously disputes that they were required under the contracts to provide Basin Electric a letter of credit as security for the contract payments, and that Midwest's failure to provide such letter of credit gave rise to a default under the contracts. Midwest does concede, however, that Basin Electric does hold a disputed claim of a value $5,000.00 greater than its security.

INTERVENING PETITIONERS

Motions to join the petition filed by Basin Electric were subsequently filed by two creditors. Pump Systems, Inc. filed its Motion to join as petitioner in this proceeding on May 3, 1984. Records of Pump Systems, Inc. reveal that Midwest was billed March 1, 1984, in the amount of $90.28 for goods shipped out that date. The records of Pump Systems, Inc. also indicate that it received payment on April 9, 1984, for the goods it shipped Midwest on March 1, 1984. Accordingly, Midwest owed Pump Systems, Inc. $90.28 for the purchase of supplies on the date that Basin Electric filed its involuntary petition. Joel Bleth, President and General Manager of Pump Systems, Inc., acknowledged that his company was not prompted to join in this proceeding because of a fear that it might not be paid on its claim against Midwest. On the contrary, Bleth

testified that Midwest was one of its smaller customers. Midwest never owed Pump Systems more than a few dollars at a time and generally paid its bills to Pump Systems, Inc. on a timely basis. Bleth testified he had no basis to allege that Midwest had not been paying its debts as they fell due. Nevertheless, Pump Systems, Inc., supported Basin Electric's petition for involuntary relief through its motion to join as a petitioner. Bleth indicated that his company was motivated to join in the proceeding because it did not wish to see the proceeding fail without the Court addressing the merits of the involuntary petition. Bleth acknowledged that his company received from Basin Electric an indemnification for certain costs it might incur as a result of its joining the petition for involuntary relief. The broad indemnification provides, as follows:

> In consideration of the Pump Systems, Inc., agreement to join Basin Electric Power Cooperative in the filing of an involuntary petition in Bankruptcy (Bankruptcy No. 84-05165) against Midwest Processing Company, Basin Electric hereby covenants to indemnify, protect and save Pump Systems, Inc. harmless from and against any and all liabilities, obligations, losses, compensatory or punitive damages, penalties, claims, actions, suits, judgments, costs, expenses and disbursements, including, without limitation, legal fees and expenses, of any kind and nature whatsoever without limitation as to amount which may be imposed on, incurred by or asserted against you pursuant to 11 U.S.C. Section 303(i) or in any way relating to or arising out of your joining with Basin Electric in the involuntary petition filing against Midwest Processing Company.

Dakota Fire and Safety Equipment Company filed its Motion to join as a petitioner in this proceeding on April 30,

1984. Midwest owed Dakota Fire and Safety on March 13, 1984, the sum of $206.69. On April 13, 1984, Dakota Fire and Safety received two payments from Midwest, leaving a zero balance on the account as of April 14, 1984. Darrell McQuay, President of Dakota Fire and Safety Equipment Company, Inc., admitted that Midwest paid its debts to his Company on a timely basis. Nevertheless, McQuay personally believed that Midwest generally was not paying its debts as they came due. McQuay acknowledged that Basin Electric was a good, steady customer of Dakota Fire and Safety. Dakota Fire and Safety received an indemnification from Basin Electric which was similar to that received by Pump Systems, Inc.

DISCUSSION AND CONCLUSIONS OF LAW

I.

Midwest initially disputes that there are a sufficient number of petitioning creditors to support the present involuntary proceeding. The requirements for an involuntary bankruptcy petition are set out in 11 U.S.C. § 303. Section 303 of the Bankruptcy Code provides in part, as follows:

> (b) An involuntary case is commenced by the filing with the Bankruptcy Court of a petition under Chapter 7 or 11 of this title—
>
> (1) by three or more entities, each of which is either a holder of a claim against such person that is not contingent as to liability or an indenture trustee representing such a holder, if such claims aggregate at least $5,000.00 more than the value of any lien on property of the debtor securing such claims held by the holders of such claims;
>
> (2) if there are fewer than 12 such holders, excluding any employee or insider of such person and any transferee of a transfer that is voidable under sections

> 544, 545, 547, 548, 549, or 724(a) of this title, by one or more of such holders that hold in the aggregate at least $5,000.00 of such claims.

11 U.S.C. § 303(b). Under section 303(b) of the Bankruptcy Code, three or more creditors must join in an involuntary petition where the alleged debtor has more than twelve creditors. When calculating the number of creditors for purposes of section 303(b)(2), recipients of preferential transfers and insiders are not included as holders of claims. *In re Skye Marketing Corp.*, 11 B.R. 891, 899 (Bkrtcy.E.D.N.Y. 1981). A majority of jurisdictions do include, however, small recurring claimants in the number of holders for purposes of section 303(b)(2) of the Bankruptcy Code. *In re Hoover*, 32 B.R. 842, 851 (Bkrtcy.W.D.Okla. 1983). In the present instance, it is undisputed that Midwest has sixteen participating unguaranteed long-term note holders in addition to its other claimants. It is evident, therefore, that the involuntary petition in this proceeding must be supported by three petitioners. Midwest argues that there are not three petitioners in this instance because of the presence of indemnity agreements, the intervening creditors have failed to join in the allegations of the petition, the claims of the intervening creditors have been fully paid, or because bad faith on the part of one or more of the petitioning creditors excludes that petitioner from participating in the proceeding.

Initially, Midwest would have this Court dismiss the petition by reason of the failure of Pump Systems, Inc., to join in the allegations of Basin Electric's involuntary petition. Midwest cites the testimony of Joel Bleth, President of Pump Systems, Inc., as evidence of Pump Systems' failure to join in the allegations of the petition. Bleth testified at the hearing on the Order For Relief that he had no reason to believe that

Midwest was not paying its debts as they came due. Pump Systems, Inc., filed its Motion to Join the involuntary petition on May 3, 1984. While there is a strict burden upon the petitioning creditors to prove a basis for involuntary relief, the procedural requirements for initiating the involuntary proceeding are not as stringently enforced. *See In re Gill Enterprises, Inc.*, 15 B.R. 328, 331 (Bkrtcy.D.N.J. 1981) ("The purpose of § 303(b)(1) is to allow more flexibility on considering involuntary actions and not to restrict or limit the involuntary process."); *In re All Media Properties, Inc.*, 5 B.R. 126, 134 (Bkrtcy.S.D.Tex. 1980) ("The notion of less restrictive jurisdictional requirements for bringing an involuntary petition is consistent with the other broad grants of jurisdiction given to the bankruptcy courts under the Bankruptcy Reform Act of 1978."). The authorities suggest that a flexible approach should be taken with regard to the requirements for initiating an involuntary proceeding. The result of such a flexible approach is that absent a clear abuse of process, the court should address an involuntary petition on its merits. As for intervention, there is no basis for a court to deny a creditor his right to intervene in an involuntary proceeding where that creditor does not voluntarily withdraw. *See In re Rush*, 10 B.R. 526, 527 (Bkrtcy.N.D.Ala. 1981) ("Under said section 303(c) a party has a right to intervene in an involuntary case under said Title 11, without any leave by the Court or the exercise of any power by the Court."). Midwest does not dispute that as of the date the petition was filed Pump Systems, Inc., held an unsecured claim which was not contingent as to liability and which remained unpaid. Midwest does request however that the Court construe the testimony of Joel Bleth as a withdrawal of Pump Systems' Motion to Intervene. Bleth testified that the written Motion

to Intervene filed on behalf of Pump Systems, Inc. on May 3, 1984, was supported by the decision of the full board of directors of Pump Systems. Bleth also testified on behalf of Pump Systems, Inc., as an officer of that company that he believed Midwest was paying its debts as they became due. It would be unfair for this court to deny the written request of Pump System's full board of directors on the basis of oral observations given by an officer of the company. Accordingly, the court recognizes Pump Systems, Inc. as a petitioner in this proceeding.

Midwest asserts that the debts it had to the intervening creditors on the date the petition was filed have been paid in full. Accordingly, Midwest argues that the intervening creditors no longer have standing to support the involuntary petition filed by Basin Electric. It has been noted that for purposes of granting or denying an order for relief under section 303 (h) of the Bankruptcy Code, the alleged debtor's debts must be examined at the time the petition is filed. One decision has indicated that "[w]hile post-petition payments of delinquent accounts may be material in some circumstances to the issue of whether relief should be granted under § 303(h)(1), post-petition payments ordinarily indicate a last ditch effort on the part of the alleged debtor to avoid bankruptcy proceedings." *In re Win-Sum Sports, Inc.*, 14 B.R. 389, 392 (Bkrtcy. D.Conn. 1981) (citing *In re All Media Properties*, 5 B.R. at 144). This Court believes that the approach towards post-petition payments of claims under § 303(h) should likewise apply to the court's analysis under section 303(b) of the Bankruptcy Code. A claimant's standing under 11 U.S.C. § 303(b) should not be eliminated merely because an alleged debtor pays its debts to that claimant after an involuntary bankruptcy petition has been filed. To hold otherwise would

disregard those claimants whose motives for petitioning for involuntary relief reach beyond the present satisfaction of their claims. Both intervening petitioners in this proceeding contemplate that they will provide goods and services to Midwest in the future, and are therefore concerned with the future operation of that company. In the present instance, the intervening petitioners held undisputed and unpaid claims against Midwest at the time the petition was filed. Those facts alone give them the right to intervene as petitioners in this proceeding.

Evidence submitted at the hearing on the Order For Relief indicates that the intervening petitioners were encouraged by Basin Electric to join in this proceeding through use of indemnification agreements. Midwest argues that Basin Electric bought out the interests of the intervening creditors through the use of the indemnification agreements, and therefore stands in the shoes of those petitioners. Midwest further argues that since Basin Electric stands in the shoes of the intervening petitioners, there is essentially only one claimant which supports the involuntary petition in this proceeding. While Basin Electric did encourage the intervening creditors to participate through use of the indemnification agreement, the court does not find that the petitioning creditors stand as one petitioner. The agreements between Basin Electric and the intervening creditors do not insure that the intervening creditors will remain as participants in this proceeding. The intervening creditors are free to withdraw their motions to join in the petition at any time. Further, it is clear from testimony at the hearing on the Order For Relief that the intervening creditors' motives for participating in these proceedings were different from that of Basin Electric. While all the petitioners generally seek to stabilize the future operations of

Midwest, Basin Electric is also concerned with its future status as a secured creditor while the intervening creditors as holders of unsecured claims seek assurance from the Bankruptcy Court that their future transactions with the alleged Debtor are protected. The Court can in no way find that the indemnity agreements transform the intervening creditors into a mere extension of Basin Electric. Three distinct petitioning creditors remain in this proceeding.

As the alleged Debtor tells it, bad faith oozes from every crack and crevice of this proceeding. Midwest argues that the petition should fail by reason of the bad faith accompanying these proceedings. One court has indicated that bad faith may be exorcised from a proceeding by the mere dismissal of the party who committed the alleged bad faith. *See In re Trans-High Corp.*, 3 B.R. 1 (Bkrtcy.S.D.N.Y. 1980). Another court has taken the position, however, that fraud or bad faith should be alleged as a defense to the merits of the petition. *See In re Rush*, 10 B.R. 526 (Bkrtcy.N.D.Ala. 1980). Under the reasoning of the court in *Rush*, the establishment of bad faith does not merely disqualify a petitioning creditor, but gives rise to a dismissal of the entire proceedings. This court will follow the reasoning of *Rush*, and will address the issues of bad faith in conjunction with this court's discussion of the merits of the involuntary petition.

This court finds no basis to disqualify any of the petitioning creditors in this proceeding. As this court has noted, intervention as a petitioner in an involuntary bankruptcy proceeding is a right which the court must acknowledge. As long as the claims which the petitioners hold are not contingent as to liability and aggregate an unsecured sum of at least $5,000.00, the court will accept the petition for involuntary relief and address its merits. Although Midwest disputes the claim of

Basin Electric, it does not dispute that Basin Electric asserts a claim in an amount which exceeds by more than $5,000.00 the value of its claimed security. Basin Electric has standing to be a petitioning creditor in this proceeding, notwithstanding that it is the holder of a disputed claim. *See In re R.N. Salem Corp.*, 23 B.R. 452, 456 (Bkrtcy.S.D.Ohio 1982) ("One need thus look no further than the statute itself for a determination that 'claim' for purposes of the Bankruptcy Code includes disputed claims and unmatured claims, . . ."). As the court has previously indicated, the intervening creditors also have standing as petitioners in this proceeding. Since there are three qualified petitioners which support the involuntary petition in this proceeding, the court will address the merits of that petition.

II.

An Order For Relief will be entered in a particular instance where the requirements of § 303(h) for Bankruptcy Court are met. That section provides, as follows:

> If the petition is not timely controverted, the court shall order relief against the debtor in an involuntary case under the chapter under which the petition was filed. Otherwise, after trial, the court shall order relief against the debtor in an involuntary case under the chapter under which the petition was filed, only if—
>
> (1) the debtor is generally not paying such debtor's debts as such debts become due; or
>
> . . . .

11 U.S.C. § 303(h). In this matter, Midwest has timely filed an answer to the petition requesting involuntary relief. The issue, then, is whether the alleged Debtor is generally not paying its debts as they become due. Midwest strongly resists the allegation that it is not meeting its financial obligations on a current basis.

Courts have been unable to arrive at a uniform standard for determining what constitutes a failure to pay debts generally. The legislative history of 11 U.S.C. § 303 offers little guidance for decision makers, since the House and Senate bills contained substantially different definitions of the test finally adopted by the conference committee. *In re Hill*, 8 B.R. 779 (D.Minn. 1981). One court has noted that under section 303(h) of the Bankruptcy Code, the primary factor to be considered is the "cessation of payment as distinguished from ability to pay." *In re 7H Land and Cattle Co.*, 6 B.R. 29, 31 (Bkrtcy.D.Nev. 1980). Other courts have adopted more mechanical tests wherein they review a variety of significant factors when determining whether an order for relief should be entered. *See In re Gill Enterprises, Inc.*, 15 B.R. 328, 332 (Bkrtcy.D.N.J. 1981) (The court looked at five factors: the timeliness of payments on past due obligations; the amount of debts long overdue; the length of time during which the debtor has been unable to meet large debts; any reduction in the debtor's assets; and the debtor's deficit financial situation.). *In re Reed*, 11 B.R. 755, 760 (Bkrtcy.S.D.W.Va. 1981) (The Court reviewed four factors: the number of debts; the amount of indebtedness; the duration of the debtor's nonpayment; and the nature and conduct of the debtor's financial affairs.). Although mechanical tests offer some guidance when reviewing the merits of an involuntary petition, a court should not restrict itself solely to factors included in a mechanical test. An early bankruptcy decision which construed 11 U.S.C. § 303(h) noted that "[t]he term 'generally' was not defined by the Bankruptcy Code in order to avoid the result suggested by the mechanical test put forth by the alleged debtors and to give the bankruptcy courts enough leeway to be able to deal with a variety of situations that will arise." *In re All Media*

Properties, Inc., 5 B.R. 126, 143 (Bkrtcy.S.D.Tex. 1980). Accordingly, courts must be sensitive to the unique circumstances involved in each involuntary proceeding.

When analyzing an alleged debtor's payment history, the courts excuse non-payment of claims which are a matter of significant dispute. *See In re Goldsmith*, 30 B.R. 956, 961-963 (Bkrtcy.E.D.N.Y. 1983) (decision details treatment of disputed claims under section 303(h) of the Bankruptcy Code). It is clear in this instance that there is a serious dispute between Midwest and Basin Electric as to the obligations under their contracts. Because of the dispute, the court will excuse Midwest's non-payment of the claim of Basin Electric. Nevertheless, sufficient evidence remains before the court to dictate that it find that Midwest is not generally paying its debts as they come due.

The most significant indication that Midwest is unable to meet its obligations on a current basis is its failure to pay interest on its long-term obligations. An interest payment of $2,786,062.61 was due February 28, 1984. Midwest failed to make that payment. Another interest payment of $2,786,062.61 is due on August 31, 1984. Since Midwest is not operating its crushing plant, the court cannot envision that the August 31, 1984 payment of interest will be met. Although Midwest has to this date only missed one interest payment, the missed payment is not of an insubstantial sum and there appears little hope that Midwest will be able to meet these interest payments in the future.

In addition to Midwest's failure to make interest payments on its long-term obligations, Midwest currently has pre-petition obligations to its shareholders in an approximate amount of $606,459.53. Midwest argues that its shareholders have allowed deferral of payments on those obligations, and therefore the debts are not currently due. One court has stated that it

"believes that such a deferral, when made by insiders, does not preclude the non-payment of these debts from being considered in ascertaining whether an alleged debtor is generally paying its debts as such become due." *In re International Teldata Corp.*, 12 B.R. 879, 882 (Bkrtcy.D.Nev. 1981). *See also In re All Media Properties, Inc.*, 5 B.R. at 147-148 ("The fact that a debtor is not paying 'insiders' who happen to be creditors, and that those 'insiders' are not pressing for payment does not negate the fact that the debtor was not paying its debts as they become due."). In addition to deferral of the obligations to its shareholders, Midwest has received a recent cash infusion from its shareholders in an approximate amount of $300,000.00. Tom Brokl, President of Midwest Processing Company, testified that he did not believe the cash infusion of $300,000.00 was intended to be a gift. Brokl did not know, however, how the cash infusion would ultimately be reflected on the company's books. In *In re Chong*, 16 B.R. 1 (Bkrtcy.D. Hawaii 1980), the court entered an order for relief in an involuntary proceeding where the alleged debtor's only income with which to make monthly obligations came in the form of gifts from relatives. In another decision, it was noted that "[a] company whose only payments of debts 'in the regular course of business' is with borrowed cash which creates still another liability is not generally paying its debts as they become due." *In re Central Hobron Associates*, 36 B.R. 111, 116 (Bkrtcy.D.Hawaii 1983). Although Midwest has been able to keep current on a large number of its monthly obligations, it has been only able to do so because of a deferral of payments on its obligations to its shareholders, in addition to the large infusions of cash received from its shareholders.

Outside of a large tax benefit sale, Midwest has operated at a continual loss since it began operations in 1982. Midwest has

also experienced a loss of approximately $4,000,000.00 in its assets from 1982 to the end of the fiscal year 1983. Midwest is not currently operating its plant and there is no assurance that the plant will open in the near future. The court can only find, after analyzing the totality of the alleged Debtor's financial history, that the petitioning creditors are entitled to an Order For Relief.

Midwest disputes that the petitioners are entitled to an order for relief because of alleged bad faith. Midwest raises as a defense to the order for relief allegations of bad faith. The Bankruptcy Court is a court of equity. Accordingly, parties seeking relief in Bankruptcy Court must come into the court in good faith and with clean hands. *In re Quality Trading Co., Inc.*, 36 B.R. 265, 269 (Bkrtcy.D.Hawaii 1984). Once it is established that in some way there is bad faith connected with the involuntary proceeding, the entire proceeding is subject to dismissal. *In re Rush*, 10 B.R. 526 (Bkrtcy.N.D.Ala. 1981). Bad faith is not defined under the Bankruptcy Code. *In re Grecian Heights Owners' Association*, 27 B.R. 172, 173 (Bkrtcy.D.Or. 1982). It has been stated, however, that "[w]hether a party acted in bad faith is essentially a question of fact." *Camelot, Inc. v. Hayden*, 30 B.R. 409, 411 (D.E.D. Tenn. 1983). The evidence submitted on the issue of bad faith should be measured by an objective test. *See In re Grecian Heights Owners' Association*, 27 B.R. at 173 ("The determination should be measured by what a reasonable person would have believed."). Accordingly, the subjective motives held by any of the petitioning creditors are not to be weighed when determining whether bad faith has been established. Previously, bad faith was found where a creditor commenced an involuntary bankruptcy proceeding on the advice of a non-lawyer. *See In re Grecian Heights Owners' Association*, 27

B.R. 172 (Bkrtcy.D.Or. 1982). Bad faith was also recognized in an involuntary proceeding where the petitioners failed to disclose that they were actually debtors of the alleged debtor. *Camelot, Inc. v. Hayden*, 30 B.R. 409 (D.E.D.Tenn. 1983).

Midwest argues in this instance that the petition for involuntary relief was initially filed in bad faith because it was not supported by the required number of petitioning creditors. It is clear that Basin Electric realized at least by the time of its meeting with Midwest officials on March 20, 1984, that Midwest had more than twelve creditors. Minutes of that meeting indicate that Basin Electric understood the need to have three supporting petitioners for an involuntary petition. Accordingly, it is evident that Basin Electric knew at the time it filed the involuntary petition that the petition was deficient because it lacked three petitioning creditors. Midwest cites as support for its position a string of decisions which have held that "[i]f the original petition was a sham, prepared with a view of being later supported by intervention of other creditors, joinder should be denied." *In re Rite-Cap, Inc.*, 1 B.R. 740, 741 (Bkrtcy.D.R.I. 1979). *See also Navison Shoe Co. v. Lane Shoe Co.*, 36 F.2d 454 (1st Cir. 1929); *In re Crofoot, Neilson & Co.*, 313 F.2d 170 (7th Cir. 1963); and *In re Crown Sportswear*, 575 F.2d 991 (1st Cir. 1978). A subsequent decision has noted, however, that "reliance on *Navison* and its progeny is misplaced." *In re Trans-High Corp.*, 3 B.R. 1, 4 (Bkrtcy.S.D.N.Y. 1980). The cases which evolved from the *Navison* decision all were decided under the prior Bankruptcy Act. The procedures utilized and the proof required for involuntary relief under the current Bankruptcy Code have been substantially changed from those proofs and procedures utilized under the prior Bankruptcy Act. Section 303(c) of the Bankruptcy Code envisions that additional creditors may join

in the petition after an involuntary bankruptcy proceeding is commenced with the same effect as if those intervening creditors had become involved in the petition at the outset of the proceedings. The bankruptcy court retains jurisdiction over an involuntary proceeding even where the action is commenced with an insufficient number of petitioners. *In re Earl's Tire Service, Inc.*, 6 B.R. 1019 (D.Del. 1980). *See also In re Mason*, 709 F.2d 1313 (9th Cir. 1983). This court believes that a creditor who fears his status before the debtor is rapidly deteriorating, and who is confident that it can prove the allegation that the debtor is not generally paying its debts as they come due, should be allowed to commence an involuntary bankruptcy proceeding and invoke the jurisdiction of the Bankruptcy Court. The Court can envision circumstances under which a creditor must take immediate action to preserve his interests, even where the creditor does not have the opportunity to solicit the support of additional creditors for its petition. *See In re All Media Properties, Inc.*, 5 B.R. at 134 ("[I]t is important that involuntary petitions be tried and resolved promptly because if the debtor is not paying its debts as they become due, then its creditors are entitled to the protection of their rights afforded by the Code and to prevent the debtor from wasting its assets."). This court will not require a creditor to sit on his hands and resist commencement of an involuntary proceeding where he only lacks the support of a sufficient number of petitioning creditors at a time when the petitioning creditor believes a delay will substantially injure the chances to recover on his claim. Notwithstanding the Bankruptcy Code's less restrictive requirements for commencement of an involuntary proceeding, the creditor's urge to petition for involuntary relief will be tempered by the potential for liability under section 303(i) of the Bankruptcy Code.

Court's have found bad faith where a creditor files an involuntary petition which contains allegations which the creditor knows to be false. *See Camelot, Inc. v. Hayden*, 30 B.R. 409 (D.E.D.Tenn. 1983). It follows, therefore, that bad faith would exist where a creditor alleges in his petition the existence of less than twelve creditors where he in fact has knowledge that the alleged debtor has twelve or more creditors. Midwest cannot argue in this particular matter that Basin Electric knowingly included false allegations in the involuntary petition. Basin Electric merely avoided making any allegations as to the number of Midwest's creditors. Further, the court does not believe it was necessary for Basin Electric to include in the petition an allegation as to the number of Midwest's creditors. It was only necessary that the petition include an allegation that Basin Electric was the holder of a claim against the alleged Debtor and to allege the basis under section 303(h) for its request for involuntary relief. The court has no basis for a finding that Basin Electric knowingly included false allegations in the involuntary petition.

A petitioning creditor must ultimately keep in mind the objective standard of bad faith. The issue of bad faith examines whether a reasonable person in the shoes of that petitioning creditor would have commenced the bankruptcy proceeding. Bad faith might exist where the debtor's financial irresponsibility is isolated to its relationship with the petitioning creditor, and that petitioning creditor commences an involuntary proceeding on a mere hunch that the debtor's financial troubles are more widespread. In this instance, Basin Electric clearly knew as of March 20, 1984, that Midwest's financial troubles were not isolated to its relationship with Basin. Further, Basin Electric has been able to gain sufficient support for its involuntary petition, and it was reasonable for

Basin Electric, in light of 11 U.S.C. § 303(c), to expect it could perfect the petition after it was filed. Accordingly, the court cannot find bad faith merely from the conduct of Basin Electric wherein it filed the involuntary petition with knowledge that it needed two additional supporting petitioners.

Midwest raises as a second basis for a finding of bad faith Basin Electric's conduct in soliciting the support of two additional petitioners. It would be idealistic for this court to believe that three creditors would voluntarily travel to the bankruptcy court and meet on its doorstep with an identical purpose, to commence an involuntary bankruptcy proceeding against an alleged debtor. Creditors whose recurring monthly claims against the debtor are but a small portion of the debtor's entire financial condition, are unlikely to expose themselves to a large potential liability associated with the commencement of an involuntary bankruptcy proceeding. Although the small claimant may have great concern over its future business with the debtor, the small creditor will most likely choose to remain uninvolved merely because of the potential liability associated with the involuntary proceeding. Where a large creditor initiates an involuntary proceeding and yet needs the support of additional petitioners, it is clear that potential intervening creditors will need to be encouraged before they get involved in the proceeding. One decision has previously condoned the use of indemnity agreements to induce participation in an involuntary proceeding. *See In re Win-Sum Sports, Inc.*, 14 B.R. 389, 392 (Bkrtcy.D.Conn. 1981). The use of indemnity agreements in this instance cannot therefore be viewed as conduct tainted by bad faith. The intervening creditors in this instance testified that they did not feel any undue pressure to join in the petition or that they were harassed in any manner by Basin Electric. Midwest did

not submit any evidence that Basin Electric's solicitations were composed of false statements. Accordingly, the court cannot find that Basin Electric's solicitation of intervening creditors constituted bad faith.

Midwest asserts as its final basis for a finding of bad faith the motives of the petitioning creditors. Midwest asserts in particular that the involuntary proceeding was commenced by Basin Electric merely as a means to draw on a letter of credit. Midwest argues that Basin Electric has no wish to see Midwest continue its operations and in fact seeks to close the generating facility which provides Midwest its steam and water and which burns the sunflower hulls that are the by-product of Midwest's operations. It is argued, therefore, that Basin Electric's request for a reorganization of the sunflower business is an empty request. Basin Electric acknowledges that it was concerned with its loss of the security which Midwest provided through the letter of credit. Drawing on the letter of credit, therefore, was one factor which contributed to Basin Electric's general concern over the deteriorating condition of Midwest. Basin Electric asserts however that it was a general concern over the future operations of Midwest which prompted the filing of the involuntary petition. As was previously noted, bad faith is measured by what a reasonable person would have believed. *In re Grecian Heights Owners' Association*, 27 B.R. at 173. The subjective motives of a petitioning creditor are not controlling. The court cannot find that it is unreasonable that a creditor with the knowledge Basin Electric gained from its meeting with Midwest officials on March 20, 1984, would initiate an involuntary bankruptcy proceeding. Likewise, the court cannot find that it is unreasonable for an intervening creditor to rely on the initiating petitioner's ability to prove the allegations of the involuntary petition. The court can in no

way find that the petitioning creditors' participation in this involuntary proceeding was prompted by bad faith.

III.

Although the Court has determined that the petitioners are entitled to an order for relief in this proceeding, Midwest requests that the Court dismiss the pending petition under 11 U.S.C. § 305. Section 305 of the Bankruptcy Code provides, as follows:

> (a) The court, after notice and a hearing, may dismiss a case under this title, or may suspend all proceedings in a case under this title, at any time if—
>
> (1) the interests of creditors and the debtor would be better served by such dismissal or suspension.

11 U.S.C. § 305(a)(1). Midwest asserts that a dismissal in this instance would best serve its creditors and cites two reasons to support its request for dismissal. First, Midwest's shareholders include two sizeable corporations who have historically supported Midwest with cash infusions. Second, Midwest contends that it has made great progress toward an out-of-court reorganization of its company.

The legislative history accompany § 305 of the Bankruptcy Code offers some guidance to the application of that section. That history provides:

> A principle of the common law requires a court with jurisdiction over a particular matter to take jurisdiction. This section recognizes that there are cases in which it would be appropriate for the court to decline jurisdiction. Abstention under this section, however, is of jurisdiction over the entire case . . . Thus, the court is permitted, if the interests of creditors and the debtor would be better served by dismissal of the case or suspension of all proceedings in the case, to so order. The court may dismiss

> or suspend under the first paragraph, for example, if an arrangement is being worked out by creditors and the debtor out of court, there is no prejudice to the rights of creditors in that arrangement, and an involuntary case has been commenced by a few recalcitrant creditors to provide a basis for future threats to extract full payment. The less expensive out-of-court workout may better serve the interests in the case. . . .

House Report No. 95-595, 95th Cong., 1st Sess. (1977) 325; Senate Report No. 95-989, 95th Cong., 2d Sess. (1978) 35, U.S. Code Cong. & Admin.News 1978, pp. 5787, 5821, 6281.

One court which has construed the legislative history believes that section 305 of the Bankruptcy Code "contemplates the instance where a non-federal insolvency has proceeded so far in those proceedings that it would be costly and time-consuming to start afresh with the federal bankruptcy process. *In re Lang*, 5 B.R. 371, 374 n. 4 (Bkrtcy.S.D.N.Y. 1980). A majority of decisions indicate that dismissal under § 305 should be granted only in limited circumstances. *See In re Wayne's Sport Haus, Ltd.*, 27 B.R. 521 (Bkrtcy.E.D.Mich. 1983); *In re New Mexico Properties, Inc.*, 18 B.R. 936 (Bkrtcy.D.N.M. 1982); *In re Win-Sum Sports, Inc.*, 14 B.R. 389 (Bkrtcy.D.Conn. 1981); *In re Nina Merchandise Corp.*, 5 B.R. 743 (Bkrtcy.S.D.N.Y. 1980); and *In re Luftek*, 6 B.R. 539 (Bkrtcy.E.D.N.Y. 1980). The narrow use of § 305 is in large part due to the non-appealable nature of dismissals under that section. *See* 11 U.S.C. § 305(c). One court has adopted a less restrictive use of § 305 in order to encourage out-of-court work-outs, recognizing that most business arrangements result from private, negotiated settlements. *In re Colonial Ford, Inc.*, 24 B.R. 1014 (Bkrtcy.D.Utah 1982). The decision in *Colonial Ford*, however, was not rendered in the context of an involuntary proceeding.

The court cannot find in this instance that the circumstances warrant a dismissal under § 305 of the Bankruptcy Code. Rather than supporting the operations of Midwest, it is evident that Pillsbury Company is actively seeking to rid itself of Midwest's affairs. Midwest's work-out effort is best characterized by the conditional buy-out agreements proposed by Pillsbury Company. At least one unguaranteed long-term note holder had not accepted Pillsbury's buy-out proposal at the time of the hearing. Also, the conditional agreements which evidence Pillsbury's proposal are far from binding on the parties who have chosen to accept. Representatives of Midwest and its shareholders acknowledged that the processing plant will not be able to continue its operations in the future without a settlement of its differences with Basin Electric. It does not appear that such a resolution is near. The court cannot dismiss this proceeding pursuant to 11 U.S.C. § 305 when out-of-court reorganization prospects appear so dim.

Midwest has looked with disfavor on the bankruptcy system since the inception of this proceeding. This court acknowledges that it does not have answers to Midwest's substantial financial troubles. The parties concerned with Midwest's future must arrive at a solution. Bankruptcy jurisdiction does, however, insure fairness and stability to all parties who are involved in the reorganization of Midwest Processing Company. Accordingly, the court will enter an Order for Relief in this proceeding.

Supreme Court, U.S.
FILED
DEC 21 1985
JOSEPH F. SPANIOL, JR.
CLERK

(2)

No. 85-887

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

BASIN ELECTRIC POWER COOPERATIVE,
a North Dakota electric cooperative corporation,

Petitioner,

VS.

MIDWEST PROCESSING COMPANY,
a North Dakota corporation

Respondent.

BRIEF IN OPPOSITION TO A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHT CIRCUIT

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STATUTORY PROVISIONS INVOLVED

Federal Rules

11 U.S.C. §303(b)

An involuntary case against a person is commenced by the filing with the bankruptcy court of a petition under chapter 7 or 11 of this title—

> (1) by three or more entities, each of which is either a holder of a claim against such person that is not contingent as to liability or the subject on [sic] a bona fide dispute, or an indenture trustee representing such a holder, if such claims aggregate at least $5,000 more than the value of any lien on property of the debtor securing such claims held by the holders of such claims;
>
> (2) if there are fewer than 12 such holders, excluding any employee or insider of such person and any transferee of a transfer that is voidable under section 544, 545, 547, 548, 549, or 724(a) of this title, by one or more of such holders that hold in the aggregate at least $5,000 of such claims;
>
> (3) if such person is a partnership—
>
> (A) by fewer than all of the general partners in such partnership;
>
> (B) if relief has been ordered under this title with respect to all of the general partners in such partnership, by a general partner in such partnership, the trustee of such a general partner, or a holder of a claim against such partnership;
>
> (4) by a foreign representative of the estate in a foreign proceeding concerning such person.

11 U.S.C. §303(c)

After the filing of a petition under this section but before the case is dismissed or relief is ordered, a creditor holding an unsecured claim that is not contingent, other than a creditor filing under subsection (b) of this section, may join in the petition with the same effect as if such joining creditor were a petitioning creditor under subsection (b) of this section.

STATEMENT OF THE CASE

Respondent Midwest Processing Company ("Midwest") adopts the Statement Of The Case of Basin Electric Power Cooperative ("Basin") with the following exceptions:

1. The Agreements between Midwest and Basin did not provide that security for the improvements to the Neal Station would be maintained. (P.C. at 7)[1]

2. It is not true that Midwest renewed the Letter of Credit in April, 1983 recognizing Midwest's obligation to provide security under the Agreements. *(Id.)*

3. After the March 20, 1984 meeting between representatives of Midwest and Basin, Basin personnel met and decided to draw on the letter of credit. The written minutes of this meeting demonstrate that Basin knew that Midwest had 12 or more creditors and that Basin needed additional creditors to file a sufficient involuntary petition. (App. at C-13)[2]

4. It is not true that "[i]n a telephone conversation that the President of Midwest initiated, he stated that Midwest did not intend to renew the Letter of Credit and would not provide any alternate security." (P.C. at 7)

5. The statement that the District Court did not disturb the finding of the Bankruptcy Court that Midwest was unable to pay its debts when due is misleading. (P.C. at 12). The District Court specifically stated that it need reach or decide that issue. (App. at C-15)

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[1] "P.C." refers to Petition for Certiorari

[2] "App." refers to Petitioner's Appendix.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

BASIN ELECTRIC POWER COOPERATIVE,
a North Dakota electric cooperative corporation,
Petitioner,

v.

MIDWEST PROCESSING COMPANY,
a North Dakota corporation
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Respondent, Midwest Processing Company ("Midwest")[3] respectfully requests that the Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit of Basin Electric Power Cooperative ("Basin") be denied.

This case is not worthy of certiorari because there are no conflicts between the Eighth Circuit and any other Circuit or the Supreme Court. Basin, in effect, asks the Court to rewrite Section 303(b) of the Bankruptcy Code and to render the three-creditor requirement contained therein meaningless.

Basin also asks the Court to engraft a definition of bad faith onto the Bankruptcy Code, even though the findings of bad faith by the Eighth Circuit are well supported by bankruptcy decisional law.

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[3]The common stock of Midwest Processing Company is owned by A.E. Staley Manufacturing Company, Pillsbury Company and Neshem-Peterson & Associates.

REASONS THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED

A. No Conflict Exists Between The Eighth Circuit And Any Other Circuit Or The Court

There is no conflict between *In re Mason*, 709 F.2d 1313 (9th Cir. 1983) and the decision of the Eighth Circuit. Basin misstates the holding of *Mason*, and the statement by the Ninth Circuit upon which Basin relies has no application to this case.

Basin argues that the Ninth Circuit in *Mason* held "that a petition by two creditors could not be dismissed unless the debtor could show a third creditor would not join." (P.C. at 15) The question of the proper filing of an involuntary petition was not before the *Mason* court and the court did not attempt to decide that issue.

In *Mason*, the Ninth Circuit upheld a bankruptcy court determination that an involuntary debtor had waived his right to object to the number of petitioning creditors by not raising the issue until after an order for relief was entered. The Ninth Circuit stated:

> We agree with the lower court's determination that Mason [the debtor] waived his right to present this defense by failing to raise it in an answer to the petition. The lack of the requisite number of petitioning creditors did not deprive the bankruptcy court of jurisdiction to enter a valid order for relief.

709 F.2d at 1318-19. In contrast, Basin has never argued that Midwest waived its right to object to Basin's one-creditor petition. As the Eighth Circuit stated: "Merely because the defects were subject to waiver does not excuse the intentional filing of a defective petition." (App. at A-8)

The debtor in *Mason* also argued that his failure to raise the defense of an insufficient number of petitioning creditors was excusable neglect or mistake, entitling him to set aside the order for relief under Rule 60(b)(1) of the Federal Rules of Civil Procedure. The court cited *Universal Film Exchanges, Inc.* v.

Lust, 479 F.2d 573 (4th Cir. 1973) wherein the Fourth Circuit stated:

> To prevail, the Rule 60(b)(1) movant must demonstrate that he has a meritorious defense *and* that arguably one of the four conditions for relief applies—mistake, inadvertence, surprise or excusable neglect.

Id. at 576 (emphasis in original). From thence comes the Ninth Circuit's statement, which Basin quotes: "The lack of three petitioning creditors would avail Mason only if he could show a third creditor would not join in the petition." 709 F.2d at 1319. Basin takes this quotation out of context.

The Ninth Circuit did not hold, as Basin claims, that an involuntary petition should not be dismissed unless the debtor can show that three creditors would not join the petition. The court was referring only to the requirement that, to set aside an order for relief under Rule 60(b)(1), a debtor must prove that he has a meritorious defense. In *Mason*, the defense was that no other creditor would have joined the petition. The court did not address the three creditor requirement.

Moreover, *Mason* did not involve a bad faith petition. The debtor in *Mason* did not contend that the two petitioning creditors knew that the debtor had twelve or more creditors. Midwest has shown that Basin filed its petition in bad faith, and Basin's petition was dismissed because of bad faith. There is no conflict between *Mason* and the present case.

There also is no conflict between the Court's decision in *Canute Steamship Company*, v. *Pittsburgh & West Virginia Coal Company*, 263 U.S. 444 (1923) and this case. In *Canute*, the Court held that the three-creditor requirement is not jurisdictional and is waivable, and that joinder of additional creditors does not amend the petition. None of these points is, or ever has been, in dispute in this case.

Basin has never argued that Midwest waived the defense of an insufficient number of petitioning creditors. Moreover, it is not the

joinder to two additional creditors, but the intentional filing of a deficient involuntary petition which warranted the dismissal of Basin's petition. The *Canute Steamship* case does not address this point.

Basin argues that the Eighth Circuit's decision runs afoul of Section 303(c) and bankruptcy procedure. Section 303(c) of the Bankruptcy Code allows additional creditors to join in an involuntary petition "as if such joining creditor were a petitioning creditor under subsection (b) of this section." *See also*, Bankruptcy Rule 1003(d). Section 303(c) is not in issue in this case. Basin ignored the three creditor requirement of Section 303(b) by filing a single creditor petition knowing that three creditors were required. This, and not the fact that two creditors later joined the petition, caused the dismissal of Basin's petition. Basin made the same argument to the Eighth Circuit and the court rejected it:

> Accepting appellant's [Basin's] argument would circumvent unduly the three creditor requirement of section 303(b). The three creditor requirement is not a meaningless formality that a creditor may ignore until after filing the involuntary petition. While an involuntary petition may be cured after filing when a single creditor file in good faith believing the debtor has fewer than twelve creditors, a single creditor may not file an involuntary petition knowing the debtor has twelve or more creditors.

(App. at A-6).

Finally, Basin argues that policies of the Bankruptcy Code are "well-served" by permitting a single creditor with knowledge of twelve or more creditors to file an involuntary petition and seek joinder of other creditors. Basin argues that "[w]hether the petitioning creditor knows the debtor has more or less than twelve creditors is irrelevant." (P.C. at 20) The policy Basin advocates is the policy the three creditor requirement was designed to avoid. As Judge Friendly noted in *In the Matter of Gibraltor Amusements, Ltd.*, 291 F.2d 22, 28 (2d Cir. 1961) (Friendly, J., dissenting), Congress enacted the three creditor requirement as part of the Bankruptcy Act of 1898 as a compromise "between

those who wanted to give the creditor an effective remedy to assure equal distribution of a bankrupt's assets and those who were determined to protect the debtor from the harrassment of ill-considered or oppressive involuntary petitions, including those by a single creditor interest." Adopting Basin's position would, as the District Court found, render the three creditor requirement of Section 303(b) meaningless. (App. at C-9) Basin's argument also ignores the concern expressed by courts that the stigma of bankruptcy attaches as soon as an involuntary petition is filed:

> An allegation of bankruptcy is a charge that ought not be made lightly. It usually chills the alleged debtor's credit and his sources of supply. It can scare away his customers. It leaves a permanent scar, even if promptly dismissed.

In re SBA Factors of Miami, Inc., 13 Bankr. 99, 101, 8 B.C.D. 281, 4 C.B.C.2d 1335 (Bankr. S.D. Fla. 1981); *See also, In re Godroy Wholesale Co.*, 37 Bankr. 496, 500, 10 C.B.C.2d 249 (Bankr. D. Mass. 1984). The policy of the Code is better served by respecting the three creditor requirement of Section 303(b)—it is "not a meaningless formality which a creditor may ignore until after filing the involuntary petition." (App. at A-6)

B. Basin Asks The Court To Rewrite Bankruptcy Law

Basin asks the Court to grant certiorari to enable the Court to define bad faith as it applies to the Bankruptcy Code. The facts of this case do not require a refinement of the bad faith standard. Two factors led the District Court and the Eighth Circuit to conclude that Basin acted in bad faith: Basin intentionally filed a deficient petition, (App. at A-6, App. at C-11) and Basin improperly attempted to invoke the jurisdiction of the Bankruptcy Court to gain an advantage in a nonbankruptcy, contract dispute. (App. at A-9, App. at C-13).

Both findings are well-grounded in decisional law and the standards to be applied are clear. Basin's contention that only an objective standard should be applied to determine bad faith is belied by the substantial case law which the District Court cites

(App. at C-11, C-12) and the fact that the bankruptcy case upon which Basin relies also looks to subjective motivations in determining bad faith. The Court need not rewrite this consistent body of law.

CONCLUSION

For the foregoing reasons, respondent Midwest Processing Company respectfully requests that the Petition for a Writ of Certiorari of Basin Electric Power Cooperative be denied.

Respectfully submitted,

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